

No.

90-819

Supreme Court, U.S.
FILED

NOV 23 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

JOHN CARR, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASS'N, et al.,

Respondents.

GREG BROOKS, JUDY CHECKERS, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASS'N, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE W. SHAEFFER, JR.
SILVER, GOLDWASSER & SHAEFFER

1201 Dove Street, Suite 600
Newport Beach, California 92660
(714) 955-1971

Counsel for Petitioners



Lorraine Mitchell - Legal Briefs
732 E WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE (213) 747-5631

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

1. Did the District Court err in granting summary judgment on the ground that Petitioners are barred from bringing their actions due to their failure to exhaust the collective bargaining grievance procedure.

2. Are there genuine issues of material fact showing Petitioners are excused from exhausting the collective bargaining grievance procedure.

3. Viewing the facts and the law in the light most favorable to Petitioners, are Petitioners excused from exhausting the collective bargaining grievance procedure for one or more of the following reasons:

a. The lack of neutrality in the membership of the Port LRC renders the

The first of these is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.
 The second is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.
 The third is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

exhaustion of the grievance procedure of the non-§13 claims futile.

b. The lack of neutrality in the membership of the Port IRC and the lack of guaranteed arbitration of §13 claims renders the exhaustion of the grievance procedure of the §13 claims futile.

c. The grievance and arbitration procedures are inadequate in situations such as this which involve a fundamental challenge to the registration process.

d. The grievance procedure is not speedy.

e. The unions' breach of their duty of fair representation excuses any claim of exhaustion as a defense.

f. The repudiation of the contract grievance and arbitration procedures by Respondents permits judicial

...of the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

...the ...
...the ...

review of Petitioners' breach of contract
claims.



LIST OF PARTIES

The Petitioners before this Court are too numerous to be conveniently listed. Therefore, the identities of each of the Petitioners are set forth in the appendix hereto, p.1a infra.

The Respondents before this Court are the Pacific Maritime Association, the International Longshoremen's and Warehousemen's Union and two of its' locals, Local 13 and Local 63.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED.	1
LIST OF PARTIES	iv
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	2
JURISDICTION	3
STATUTE INVOLVED	5
STATEMENT OF THE CASE.	6
A. Nature of the Case and Course of Proceedings.	6
B. Statement of Facts.	10
1. The parties.	10
2. Relevant contract provisions	12
a. Non-§13 and §13 claims or grievances.	12
b. Grievance procedure	14
3. The challenged registration	18
4. The registration appeals process.	20
5. Petitioners' grievances.	20



TABLE OF CONTENTS cont'd...

PAGE

REASONS FOR GRANTING THE WRIT. 28

**I. The Doctrinaire Approach of the
Ninth Circuit's Decision in this
Matter Conflicts with Decisions of
this Court, Decisions of Other
Circuits, and Defeats the Overall
Purpose of Federal Labor Relations
Policy 28**

**A. The Lack of Neutrality in the
Membership of the Port LRC
Renders the Exhaustion of the
Grievance Procedure of the Non-
§13 Claims Futile. 29**

1. Introduction 29

**2. Exhaustion of non-§13
claims was futile 36**

**3. Exhaustion of §13 claims
was futile. 42**

**B. The Grievance and Arbitration
Procedures are Inadequate in
Situations such as this which
Involve a Fundamental Challenge
to the Registration Process. . 45**

**C. The Grievance Procedure is
not Speedy 53**

**D. The Union's Breach of its'
Duty of Fair Representation
Excuses any Claim of Exhaustion
as a Defense 57**



TABLE OF CONTENTS cont'd...	<u>PAGE</u>
E. Repudiation of Contract Grievance and Arbitration Procedures by Defendants Permit Judicial Review of Plaintiffs' Breach of Contract	61
1. The Port LRC Discouraged Appeals	62
CONCLUSION	65



TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Carr v. Pacific Maritime Association</u> 904 F.2d 1313 (9th Cir. 1990)	2
<u>Cook Industries, Inc. v.</u> <u>C.Itoh & Co., Inc.</u> 449 F.2d 106, (2nd Cir. 1971)	34
<u>Del Costello v. International</u> <u>Brotherhood of Teamsters</u> 462 U.S. 151, 155, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)	22
<u>Early v. Eastern Transfer</u> 699 F.2d 552, 558 (1st Cir. 1983)	34
<u>Glover v. St. Louis - S.F.Ry.</u> 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969)	29, 31-33
<u>National Labor Relations Board v.</u> <u>International Longshoremens and</u> <u>Warehousemens, Union Local 13</u> 549 F.2d 1346	49
<u>Republic Steel Corp. v. Maddox</u> 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965)	28, 31-33 45
<u>Sheet Metal Workers v. Kinney Air</u> <u>Conditioning Company</u> 756 F.2d 742 (9th Cir. 1985)	32



CASES

PAGE

United Steelworkers of America
Local 1913 v. Union Railroad Co.
648 F.2d 905 (3d Cir. 1981)

34

Vaca v. Sipes

424 U.S. 554, 96 S.Ct. 1048,
47 L.Ed.2d 231 (1976)

29, 57, 58
61-62

Williams v. Pacific Maritime Assn.
617 F.2d 1321, 1330 n.15
(9th Cir. 1980)

45, 48

STATUTES

United States Code

28 USC §1254(1)

5

28 USC §1337

3

29 USC §185

3, 5, 6



IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOHN CARR, ET AL.,

Petitioners,

v.

PACIFIC MARITIME ASS'N, ET AL.,

Respondents.

GREG BROOKS, JUDY CHECKERS, ET AL.,

Petitioners,

v.

PACIFIC MARITIME ASS'N, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that
a writ of certiorari issue to review the
judgment and opinion of the United States
Court of Appeals for the Ninth Circuit
entered in this action on May 21, 1990.

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILL. 60607

1970

1971

1972

1973

1974

1975

1976

1977

1978

1979

1980

1981

1982

1983

1984

1985

1986

1987

1988

1989

1990

1991

1992

1993

1994

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit in this matter is for publication. The Opinion is reported at 904 F.2d 1313 (9th Cir. 1990). The Opinion is reprinted in the Appendix hereto, p.1a, infra.

The District Court's Statement of Uncontroverted Facts and Conclusions of Law, and Summary Judgment (Fernandez, j.) entered June 3, 1987 have not been reported. They are reprinted in the appendix hereto, p.61a and p.75a, respectfully, infra.

The District Court's findings and judgment in the related actions of Brooks and Checkers are identical in all material respects to Carr; therefore, they are not reprinted in the appendix.



JURISDICTION

The jurisdiction of the District Court was invoked pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) and (b), and 28 U.S.C. §1337.

On June 8, 1987, the District Court entered summary judgment in favor of Pacific Maritime Association (hereinafter "PMA"), International Longshoremen and Warehousemen's Union (hereinafter "ILWU"), and International Longshoremen and Warehousemen's Union, Locals 13 and 63 (hereinafter "Local 13" and "Local 63"), and against the plaintiffs in the Carr action.¹ On July 6, 1987, the Carr

¹ The individual plaintiffs in the Carr, Brooks, and Checkers actions will be hereinafter collectively referred to as "Carr", "Brooks", and "Checkers" unless otherwise indicated.

Plaintiffs filed a Notice of Appeal.

The Brooks and Checkers actions were consolidated by the district court for all purposes on September 21, 1987. On September 29, 1987, the District Court entered summary judgments in favor of PMA, ILWU and Locals 13 and 63, and against the plaintiffs in the Brooks and Checkers actions. On October 16, 1987, the Brooks and Checkers plaintiffs filed Notices of Appeal.

On September 16, 1988, the case was argued before a panel of the Ninth Circuit Court of Appeals and submitted. On May 21, 1990, the Court's Opinion was filed affirming the decisions of the District Court. Judge Hall filed a lengthy dissent. See, p.1a, infra.

On June 6, 1990, a Petition for Rehearing with Suggestion for Rehearing En



Banc was filed. On August 24, 1990, the Ninth Circuit filed an order denying the petition for rehearing, and rejecting the suggestion for a rehearing en banc.

Petitioners have made no application for an extension of time to file a Petition for Writ of Certiorari.

The jurisdiction of this Court to review the judgment in the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §185. Suits by and against labor organizations.

Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employee and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor

organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Nature of the Case and Course
 of Proceedings.

Petitioners' cases arise under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185. The Carr action was filed on November 5, 1985; the Brooks action was filed on January 15, 1986; and the Checkers action was filed on March 24, 1986. Petitioners filed actions against Respondents alleging that their failure to be registered as either longshoremen or clerks was in violation of various terms of



the applicable collective bargaining agreements. The actions seek the registration of Petitioners as longshoremen or clerks, the deregistration of individuals who were improperly registered, and the appointment of a special master to control or monitor all future registrations in the Los Angeles-Long Beach Harbors (hereinafter "Harbors").

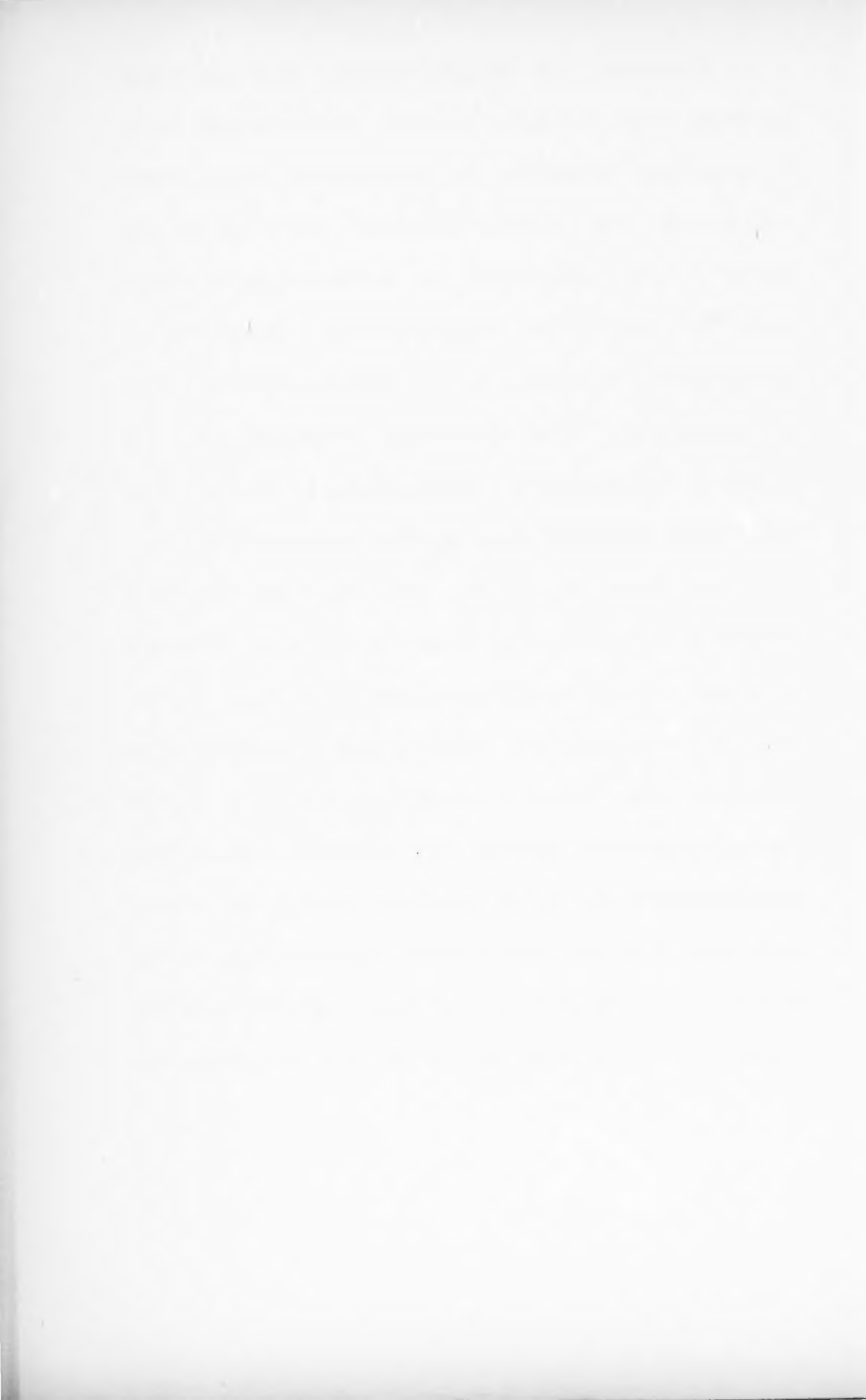
The underlying dispute arose when Respondents registered additional Class "B" longshoremen and Class "B" clerks for Harbors. Employment as a longshoremen or clerk is accomplished by a registration process. The registration process being challenged in this action occurred from approximately September of 1984 through early May of 1985. The Petitioners were not selected for registration as either longshoremen or clerks.

1

1
N

Pursuant to stipulation, the parties agreed to limit their discovery and thereafter engaged in extensive discovery related to the issues of whether Petitioners exhausted or were excused from exhausting the collective bargaining grievance procedure. Pursuant to the stipulation, the parties engaged in no formal discovery associated with the specific contentions in the Complaints.

On June 11, 1986, the parties filed a stipulation and the district court ordered a stay of the proceedings in all three actions until a scheduled arbitration involving the timeliness of the Petitioners' group grievances alleging discrimination (§13 claims) could be heard and decided by the coast arbitrator. The district court's order specifically permitted the completion of the outstanding



discovery among the parties on the exhaustion issues. The stipulation was without prejudice to the parties' claims concerning the adequacy of the grievance procedure. Petitioners intention to oppose the Motions for Summary Judgment on any one of the exceptions to the exhaustion rule was clearly stated in the stipulation.

The arbitrator issued his decision on January 15, 1987 (discussed, *infra.*). The arbitrator found Petitioners §13 discrimination claims were time barred, and there had been no abuse of discretion in failing to extend the ten day time period for filing §13 discrimination claims. The Petitioners' non-§13 claims were not the subject of the arbitration award.

Summary judgments were entered in favor of Respondents and against Carr on June 8, 1987, and against Brooks and

Checkers on September 29, 1987. The District Court held that Petitioners were barred from maintaining their actions by their failure to exhaust the collective bargaining grievance procedure. The Ninth Circuit affirmed with Judge Hall dissenting. The merits of Petitioners' claims have never been addressed by the Port LRC, the arbitrator, the district court, or the Ninth Circuit.

B. Statement of Facts.

1. The parties.

PMA is an association of West Coast stevadoring, shipping, and terminal companies. The ILWU is the exclusive bargaining representative of longshoremen and clerks who work for PMA members. Local 13 is an affiliated local union of ILWU. Local 13 represents longshoremen employed by PMA member companies in the Harbors.



Local 63 is also an affiliated local union of ILWU. Local 63 represents clerks employed by PMA member companies in Harbors.

PMA and ILWU are parties to a collective bargaining agreement known as the Pacific Coast Longshore and Clerks Agreement (hereinafter "PCLCA"), which is comprised of two documents: the Pacific Coast Longshore Contract Document (hereinafter "PCLCD"), and the Pacific Coast Clerks Contract Document (hereinafter "PCCCD"). The PCLCD governs the terms and conditions of employment for longshoremen employed by PMA member companies. The PCCCD governs the terms and conditions of employment for marine clerks employed by PMA members companies. The parties to the PCLCA, PCLCD, and PCCCD are PMA, on behalf of its member companies, and the ILWU on



behalf of itself and certain of its affiliated local unions.

Petitioners are 127 casual longshoremen and clerks whose applications for registration is class "B" longshoremen or clerks in the Los Angeles Harbor area were rejected.

2. Relevant contract provisions

(a) Non-§13 and §13 claims or grievances.

Petitioners allege, in their complaints filed in district court and in the group grievances filed with the Port LRC violations of various sections of the collective bargaining agreements; the claims are denominated non-§13 and §13 (discrimination) claims. Petitioners' non-§13 (non-discrimination) claims involve the following allegations: A violation of §8.31



of the PCLCD which requires the Joint Port Labor Relations Committee and the Coast Labor Relations Committee (hereinafter "Port LRC" and "Coast LRC") to control the registration process.² Petitioners allege a violation of §8.43 which prohibits favoritism or discrimination in the hiring of longshoremen.³ Petitioners request the deregistration and discharge of any individual who violated §8.43 pursuant to §8.44.⁴ Petitioners allege a violation of §9.1 which recognizes the principle of promotion from the ranks.⁵ Petitioners

² §8.31 is reprinted in the appendix hereto, p.83a, infra.

³ §8.43 is reprinted in the appendix hereto, p.83a, infra.

⁴ §8.44 is reprinted in the appendix hereto, p.83a, infra.

⁵ §9.1 is reprinted in the appendix hereto, p.83a, infra.



allege a violation of §9.2 which requires some of the qualifications for promotion to be length of service in the industry and competency.⁶ Petitioners allege a violation of the good faith guarantee, §18, which requires the Respondents to observe the agreements in good faith.⁷ Finally, Petitioners allege a §13 (discrimination claim) in violation of §13 on the basis of membership or non-memberships in the Union.⁸

(b) Grievance procedure.

The relevant collective bargaining grievance procedure is set forth in §17 of the PCLCA and PCLCD. The details

⁶ §9.2 is reprinted in the appendix hereto, p.83a, infra.

⁷ §18.1 is reprinted in the appendix hereto, p.83a, infra.

⁸ §13 is reprinted in the appendix hereto, p.83a, infra.



of the various provisions of the grievance procedure are discussed in Williams v. Pacific Maritime Association 617 F.2d. 1321, 1325-26, 1329 (9th Cir. 1980). Generally, the grievance procedure provides a process to resolve non-discrimination or non-§13 grievances, and a procedure to resolve discrimination or §13 grievances. A §13 grievance is explicitly limited to claims of discrimination based upon, inter alia, membership or non-membership in the Union. Williams v. Pacific Maritime Association, supra, at 1329.

Non-§13 grievances are processed pursuant to the provisions of §17.23.⁹ Section 17.23 empowers the Port LRC to investigate and adjudicate the

⁹ §17.23 is reprinted in the appendix hereto, p.83a, *infra*.



grievance. Pursuant to §17.24¹⁰, a decision of the Port LRC on the grievance is final and binding except where there is a disagreement between the employer and union members of the Port LRC. Thus, an individual grievant relying on provisions of the PCLCA other than §13 has no right of appeal beyond the Port LRC. (Id.)

If a grievant alleges a claim of discrimination in violation of §13 (a §13 claim or grievance), the grievance is processed according to the terms of §17.4.¹¹ The process is described in §17.41 and is started by filing a grievance with the Port LRC setting forth the facts of the alleged discrimination. The

¹⁰ §17.24 is reprinted in the appendix hereto, p.83a, infra.

¹¹ §17.4 is reprinted in the appendix hereto, p.83a, infra.



grievance is to be filed within ten days of the date of the occurrence of the alleged discrimination. The Port LRC is to investigate the grievance and to allow the grievant to appear, to state his case, and to present oral and written evidence and argument.¹² Section 17.411 permits the Port LRC to extend the time for filing a claim of discrimination by up to six months when it determines that an extension is necessary to prevent inequity.¹³ Section 17.42 permits the grievant, the employer, or the union to appeal a decision of the Port LRC to the Coast LRC.¹⁴ Pursuant to §17.421, the Coast LRC is empowered to

¹² §17.41 is reprinted in the appendix hereto, p.83a, infra.

¹³ §17.411 is reprinted in the appendix hereto, p.83a, infra.

¹⁴ §17.42 is reprinted in the appendix hereto, p.83a, infra.



confirm, reverse or modify the decision of the Port LRC with or without a further hearing.¹⁵ Section 17.43 provides that: "An appeal from the decision of the [Coast LRC] can be presented to the Coast Arbitrator....by the individual involved, the Employers, or the Union."¹⁶ Section 17.431 defines the arbitration procedure to be "[t]he procedures generally applicable under this agreement..."¹⁷ Section 17.5 describes the powers of the arbitrators and the finality of their decisions on the parties.

3. The challenged registration.

¹⁵ §17.421 is reprinted in the appendix hereto, p.83a, infra.

¹⁶ §17.43 is reprinted in the appendix hereto, p.83a, infra.

¹⁷ §17.431 is reprinted in the appendix hereto, p.83a, infra.



The Coast LRC authorized the registration of 350 additional Class "B" longshoremen and clerks in Harbors in August, 1984. Approximately 30,000 applications were handed out for registration as a longshoremen or clerk.

Approximately 22,250 completed applications were returned by September 26, 1984. The applications were scored by a committee comprised of representatives of PMA and Locals 13 and 63. The applications were scored by the committee and those individuals with the highest scores were interviewed. In January of 1985, the committee commenced registering successful applicants in groups of 50. The initial phase of the registration was completed on May 4, 1985 resulting in the registration of 300 Class "B" longshoremen, 50 marine clerks, and an additional 40 individuals



with tied scores. Ultimately, 410 individuals were registered as longshoremen, and between 58 and 60 individuals were registered as clerks.

4. The registration appeals process.

Pursuant to the direction of the Coast LRC, a notice was posted on May 6, 1985 in the longshore, clerk, and casual dispatch halls notifying individuals that the initial phase of registration had been completed, and appeals would be considered timely if received on or before May 15, 1985.

5. Petitioners' grievances.

Approximately 318 appeals or grievances were filed by unsuccessful applicants for registration on or before May 15, 1985. Among those filing individual appeals or grievances were 28 of



the original Carr Petitioners. Carr Petitioners Wasserman and Schreiner raised nepotism and favoritism in the registration process in their individual grievances. The grievances of Schreiner and Wasserman are still pending before the Port LRC. (Id.)¹⁸ All of the other individual grievances by the Carr Petitioners were denied.

All of the Brooks Petitioners filed individual appeals with the Port LRC on or before May 15, 1985. Brooks Petitioners Booher, Carlisle, and Juergensen received no notification from the Port LRC regarding the status of their

¹⁸ Schreiner and Wasserman are permitted by the summary judgment to pursue only the timely filed individual grievances.



appeal.¹⁹ The individual grievances filed by all other Brooks Appellant were denied by the Port LRC.

All but four of the Checkers Petitioners filed individual appeals with the Port LRC. The individual appeals which were filed were denied.

On October 16, 1985, a statement of grievance was submitted to the Port LRC on behalf of the Carr Petitioners. The grievance was amended and mailed to the Port LRC on October 23, 1985.²⁰ The first

¹⁹ Booher, Carlisle, and Juergensen are permitted by the summary judgment to pursue only the timely filed individual grievances.

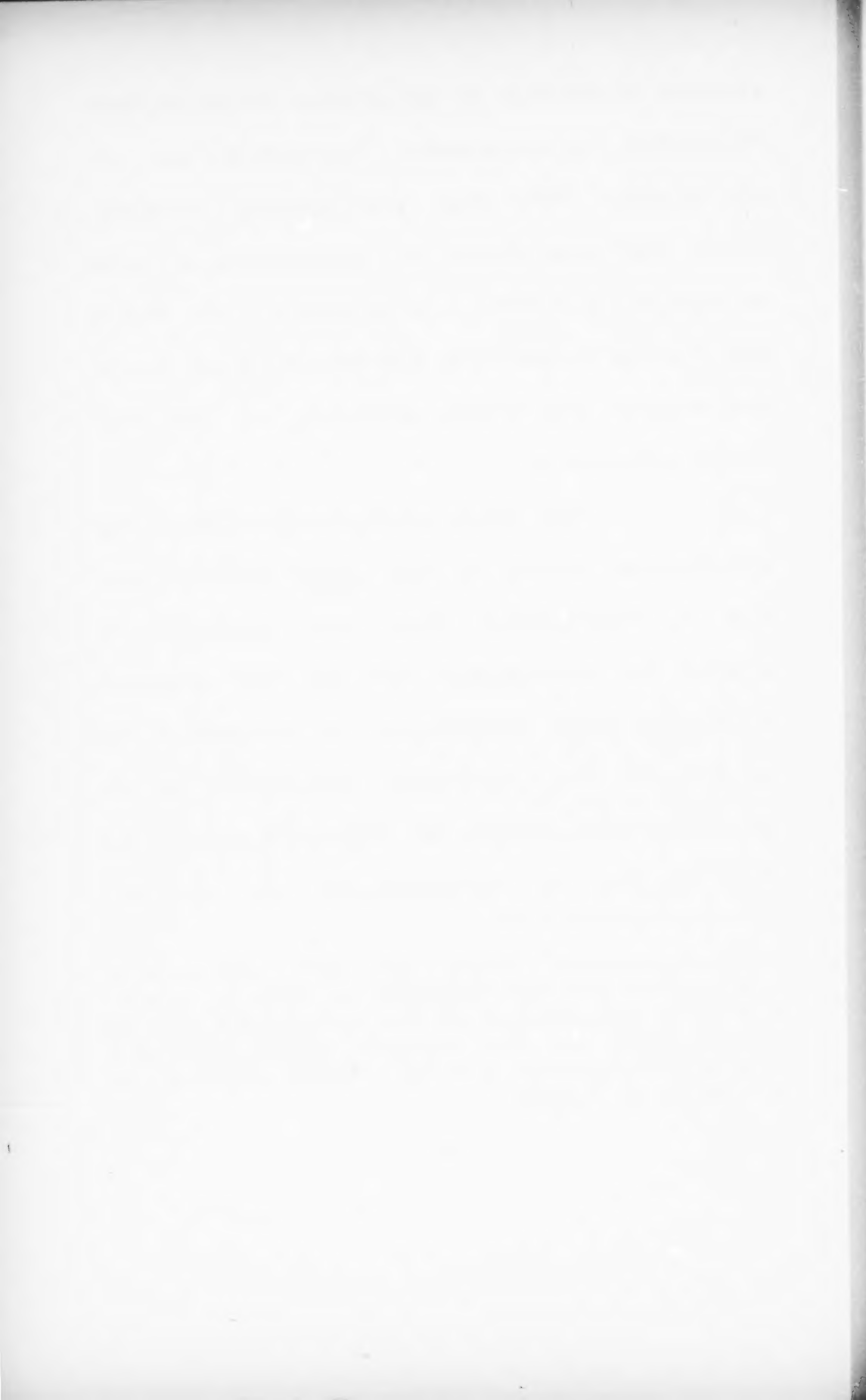
²⁰ The Carr complaint was filed in district court on November 5, 1985. The proximity of the complaint and the group grievance filed on October 16, 1985 was due to the six month statute of limitation which applies to these types of actions. Del Costello v. International Brotherhood of Teamsters 462 U.S. 151, 155, 103 S.Ct. 2281, 2285, 76 L.Ed.2d 476 (1983). Carr



amended statement of grievance (hereinafter "amended grievance") includes as an attachment "B" the preliminary factual basis for the claim of favoritism in the selection process. Attachment "B" shows the family connection between many of those registered and union members, or PMA and Union officials.

The basic grounds for the group grievances filed by the Carr Petitioners was a contention that the individuals listed in attachment "B" to the amended grievance were registered in violation of §8.43 of the contract documents which prohibit favoritism or discrimination in the hiring of longshoremen or clerks.

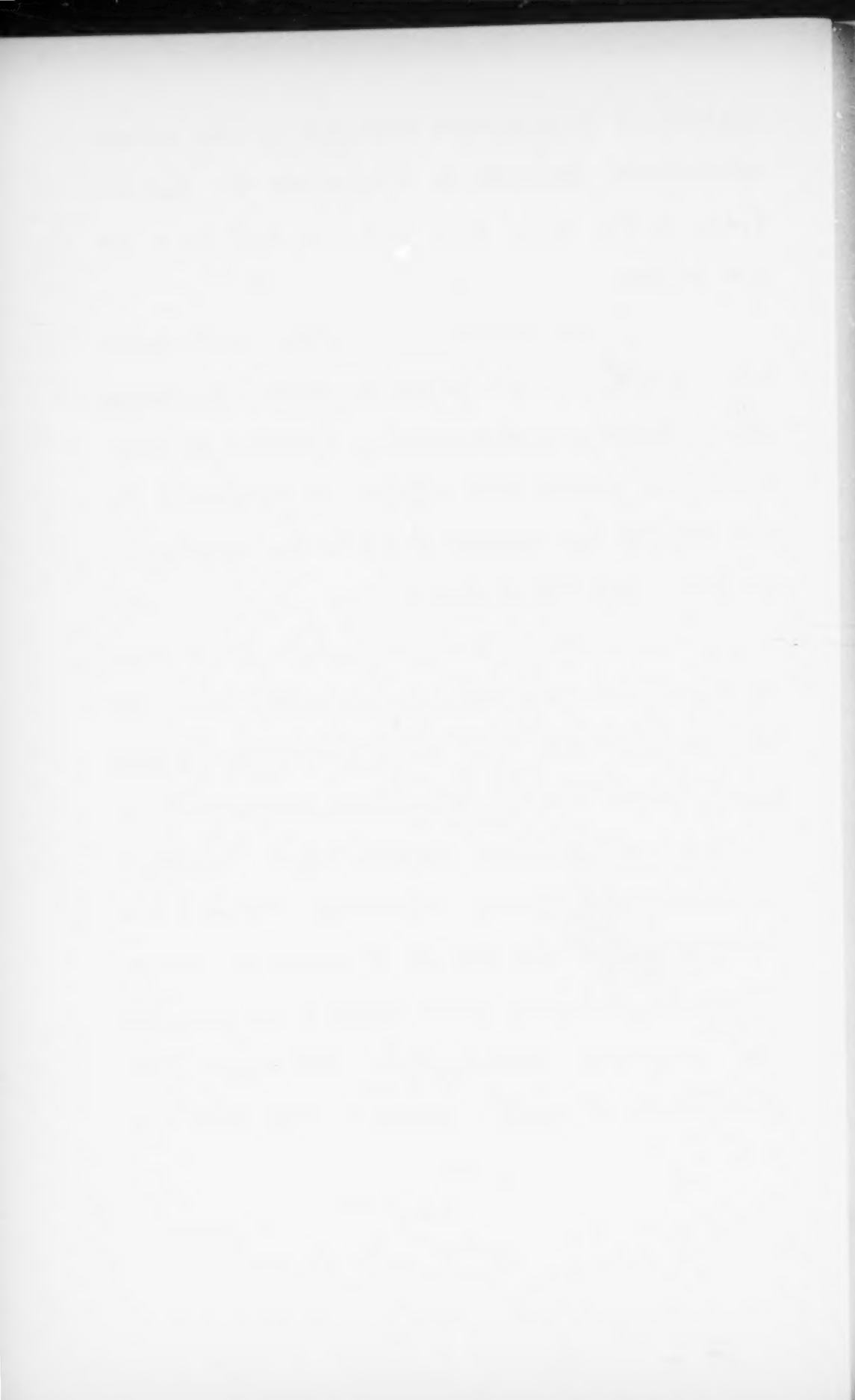
was concerned that if the six month limitation period accrued on May 6, 1985, the date the notice of the grievance period was posted at the casual hall, the six month limitation period would expire on November 6, 1985.



Additional facts were alleged in the group grievances showing a violation of §§8.3, 8.43, 8.44, 9.1, 9.2, 9.3, 13 and 18.1 of the PCLCD.

On January 16, 1986, and March 25, 1986, the Brooks and Checkers Petitioners, respectively, filed appeals with the Coast LRC which incorporated as the ground for appeal the amended grievance of the Carr Petitioners.

The statement of grievance filed by the Carr Petitioners with the Port LRC on October 16, 1985 provides, inter alia, that "[A]ll grievants raise common claims which are based upon recently discovered facts derived from the collaborative efforts of grievants. Thus, grievants believe the instant grievances are properly before the committee for resolution of their claims." The Port LRC



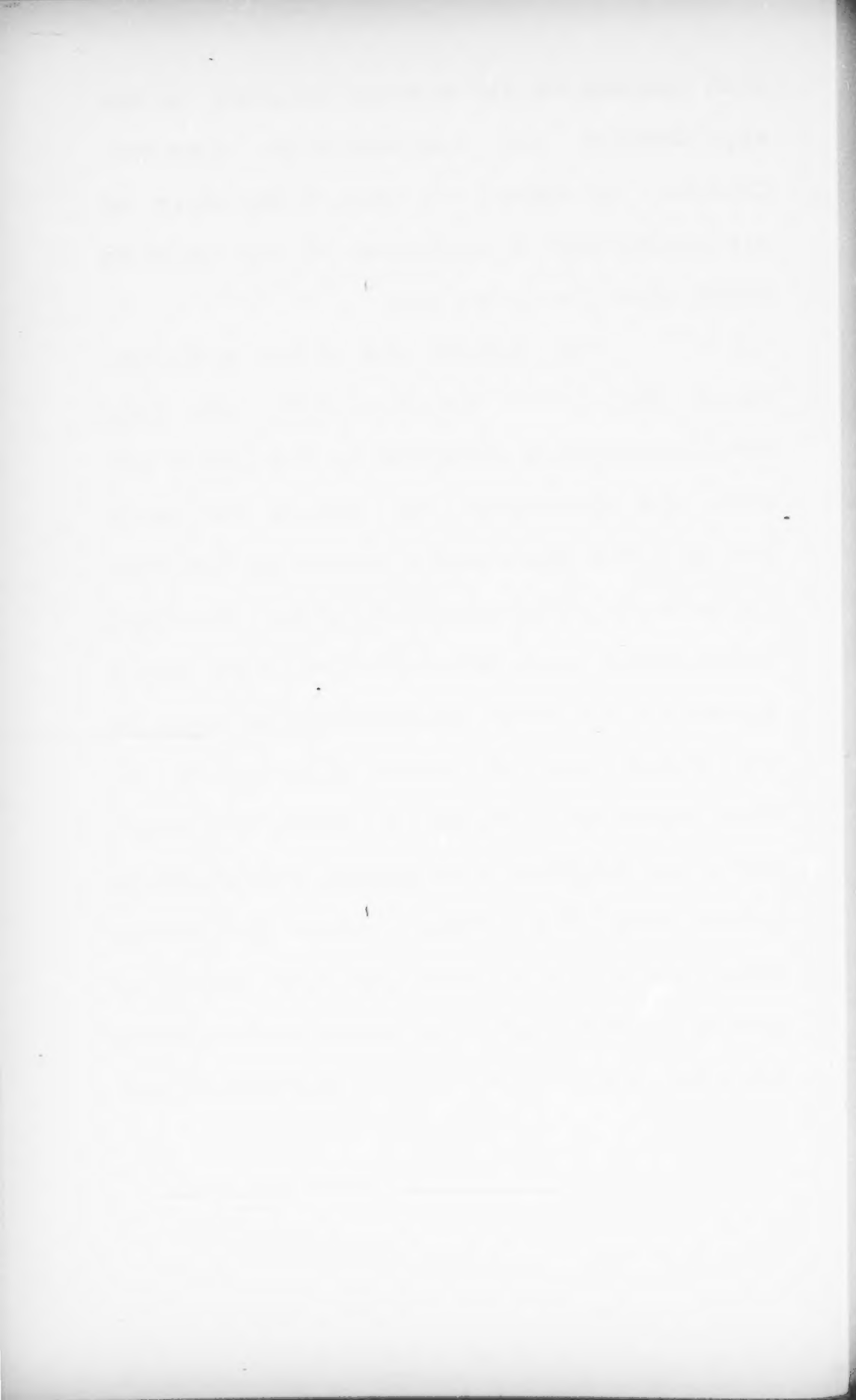
had the discretion to hear the group grievance pursuant to the provisions of §17.411. §17.411 permits a discretionary six month time period within which to file a §13 claim of discrimination to prevent inequity. See note 14, supra.

Carr was advised on April 11, 1986 by the Port LRC that the group grievance was denied on the grounds that it was untimely. Carr was notified that appeals were to be filed within ten days of either the action giving rise to the grievance or the occurrence of the alleged discrimination. Since the Carr grievance was filed more than five months after the completion of the registration, the grievance was denied as being untimely. (Id.) Carr was further notified by the Port LRC in the April 11, 1986 letter that the decision was not appealable and final



with respect to all matters relating to the application and registration process. However, an appeal of bona fide claim of discrimination in violation of §13 could be filed with the Coast LRC.

An appeal was filed with the Coast LRC. On May 1, 1986, the Carr Petitioners were notified by the Coast LRC that the grievance was denied as being untimely for the reasons stated in the Port LRC's decision of April 11, 1986. The Carr Petitioners were advised that they could appeal to the Coast Arbitrator the issue of the timeliness of their §13 claims of discrimination. On May 1, 1986, the Coast LRC also notified the Brooks and Checkers Petitioners that their group grievances were denied, but they had the right to appeal to the Coast Arbitrator claims which asserted discrimination in violation of §13



of the PCLCA.

Appeals were filed to the Coast Arbitrator. In a letter from the Coast LRC dated May 16, 1986, all Petitioners were advised that: "Your appeal with respect to this case shall be limited to the timeliness of the filing of §13 discrimination claims by the above-named individuals." The arbitration was to be heard in San Francisco.

The Coast Arbitrator issued his decision on January 15, 1987. The Arbitrator found Petitioners' §13 discrimination claims were timed barred, and there had been no abuse of discretion by the Port LRC in failing to extend the ten day time period for filing §13 discrimination claims under §17.411.

The merits of Petitioners' grievances were not presented or resolved



during the collective bargaining agreement grievance procedure.²¹

REASONS FOR GRANTING THE WRIT

- I. The Doctrinaire Approach of the Ninth Circuit's Decision in this Matter Conflicts with Decisions of this Court, Decisions of Other Circuits, and Defeats the Overall Purpose of Federal Labor Relations Policy.

As a general rule, employees must attempt to exhaust the grievance and arbitration procedures established in a collective bargaining agreement prior to bringing an enforcement action in district court. Republic Steel Corp. v. Maddox 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580

²¹ Petitioners also filed intra-union appeals with the ILWU. The appeals were identical to those filed with the Port LRC. The ILWU decided not to hear these appeals.



(1965); Vaca v. Sipes 424 U.S. 554, 563, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231 (1976).

The exhaustion requirement is subject to a number of exceptions under a variety of situations when the doctrinaire application of the exhaustion rule would defeat the overall purposes of the federal labor relations policy. Glover v. St. Louis-S.F.Ry. 393 U.S. 324, 329-31, 89 S.Ct. 548, 551, 21 L.Ed.2d 519 (1969). The Petition presents such situations.

A. The Lack of Neutrality in the Membership of the Port LRC Renders the Exhaustion of the Grievance Procedure of the Non-\$13 and \$13 Claims Futile.

1. Introduction.

The Court is requested in this Petition to settle the confusion surrounding the degree of attempt which



must be made to utilize the private collective bargaining grievance procedure when such attempt would be clearly futile. As Judge Hall notes in her dissent, the Ninth Circuit's majority opinion in this case "[C]ompletely emasculates the bias/futility exception". (Slip Op. Appendix p.46a).

The majority opinion requires Petitioners to file grievances with a biased committee and allege in the grievance that the committee is biased. As Judge Hall notes, the Petitioners in this action implicitly raised their objection by specifically alleging in the grievance particular family connections between successful registrants and PMA and union officials, members and employees; therefore, the Petitioners' objection to the Port LRC's lack of neutrality on the



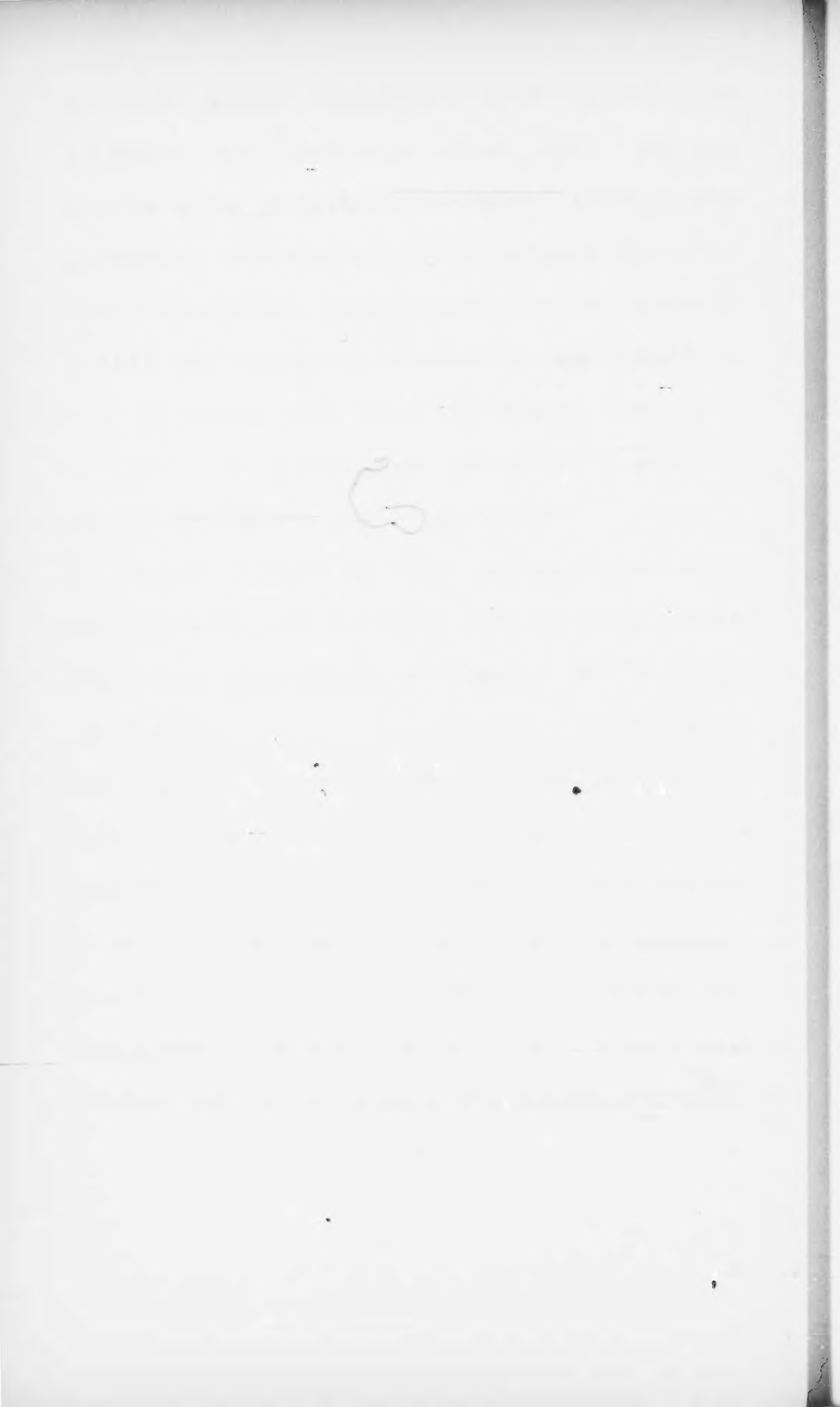
appeared on the face of the grievance. (Slip Op. Appendix at p.43a). Judge Hall states that the Petitioners should be excused from exhausting the grievance procedure "[B]ecause it would have been a futile act to submit a nepotism grievance to a biased Port LRC panel on which both union and management representatives had engaged in the cronyism of which the appellants complained." (Slip Op. Appendix at p.47a).

Judge Hall notes that Maddox was decided by this Court prior to Glover. It appears logical that an attempt to exhaust the collective bargaining grievance procedures is required prior to claiming such procedures are inadequate. However, such an attempt is useless if plaintiffs fit within the bias/futility exception. (Slip Op. Appendix p.46-47, 50 & nn.6 and



9a). Judge Hall correctly notes that in Glover the only attempt to exhaust contractual remedies consisted of a simple informal complaint to the company regarding discrimination; the Glover employees never utilized the grievance procedure by filing a formal complaint with the union or the company. (Slip Op. Appendix p.46 n.6a).

Finally, the majority holds that Petitioners waived their right to claim bias on the part of the Port LRC by failing to raise the objection when the committee convened. The majority, therefore, rejects Petitioners' claim that they are excused from exhausting the collective bargaining grievance procedure because the grievance procedure is futile. The majority relies upon the Ninth Circuit opinion of Sheet Metal Workers International Association, Local No. 420 v.



Kinney Air Conditioning Company 756 F.2d
742 (9th Cir. 1985).

The Ninth Circuit's application of Kinney to the present matter effectively overrules this Court's opinion in Glover as stated by Judge Hall in dissent. (Slip Op. Appendix p. 46-47a). Judge Hall readily distinguishes Kinney from the present matter. Petitioners were not signatories to the collective bargaining agreement, Petitioners had no direct say in the establishment of the procedures for selecting panelists to the committee, and Petitioners have never obtained a determination on the merits of their contract claims. (Slip Op. Appendix p.42-43a). Therefore, Petitioners stand on a much different footing than the parties in Kinney who claimed bias at the conclusion of the dispute resolution process although

the bias was known in advance to the parties prior to the arbitration. Kinney clearly waived his objection when he failed to object to the selection of the board members at the time they were seated to hear the grievance. Kinney, supra at 746.

The following three other cases cited by the majority opinion conflict with the facts in the instant matter: Early v. Eastern Transfer, 699 F.2d 552, 558 (1st Cir. 1983), cert denied, 464 U.S. 824 (1983); Cook Industries, Inc. v. C.Itoh & Co., Inc., 449 F.2d 106, 107-08 (2d Cir. 1971), cert denied, 405 U.S. 921 (1972); United Steelworkers of America Local 1913 v. Union Railroad Co., 648 F.2d 905, 913-14 (3d Cir. 1981). As Judge Hall notes, all three cases involve situations where individuals went through an arbitration process without objecting until they



received an adverse ruling. The plaintiffs then complained in federal court about bias situations which they knew prior to proceeding with the arbitration. (Slip Op. Appendix p.40 n.4a).

Judge Hall notes in dissent that the Petitioners in this action are required under the majority opinion to present their bias claim to the Port LRC before proceeding to federal court. Because Petitioners failed to specifically state that the committee members of the Port LRC were "biased", Petitioners waived their right to object to the bias of the board. This interpretation overrules Glover. As we previously stated bias of the committee is clearly established in the group grievance and in the evidence presented in opposition to the motion for summary judgment. The doctrinaire approach



of the majority in this case defeats the overall purpose of federal labor relations policy. The majority opinion makes it now impossible to bring a §301 action.

2. Exhaustion of non-§13 claims was futile.

Petitioners assert many non-§13 discrimination claims. For example, individuals were encouraged to falsify information and documentation on their applications, individuals were coached, applications were prescored, individuals were registered with little or no prior maritime employment experience, and Respondents failed to give priority in registration to those individuals working out of the casual hall. As previously stated, the parties agreed to limit their discovery to the exhaustion issues, the subject of the present appeal.



Nevertheless, Petitioners conducted thier own informal investigation. Petitioners have identified 223 of the successful registrants who have little or no hours of experience as casual longshoremen. Thus, Petitioners have presented evidence establishing the validity of their contentions that sections of the PCLCD other than §13 were violated by Respondents.

The identical lack of neutrality found to exist in Glover exists in the present appeal. The Petitioners are challenging the very decision of the Port LRC in registering those individuals with family connections to members of the Port LRC. The Port LRC minutes of October 16, 1985 reflect the minutes of the meeting at which time the Petitioners presented to the Port LRC their group grievance. The



chairman of the committee was David Arian, President of Local 13. Charles Young, an employee of PMA, was present for the employers.

Arian's sister was registered as a clerk during the 84-85 registration. Young's mother was registered as a clerk during the recent registration, and Young's girlfriend was registered as a longshoremen.

Moreover, Arian and Young were two of the individuals who participated in reviewing the grievances filed by the 318 individuals who had filed appeals or grievances from their unsuccessful registration. The minutes of the Port LRC identify those individuals who reviewed the registration grievances or appeals on behalf of PMA and the Locals. Young and Arian considered a total of 109 grievances

from May 20, 1985 through July 9, 1985.

Furthermore, additional represent-atives of the Port LRC who reviewed some or many of the 318 individual grievances also had family members who were registered. Judge Hall identifies 6 Port LRC representatives who had from 1 to 7 family members registered. (Slip Op. Appendix p.38 n.3a).

The futility of presenting the Appellant's grievance during the ten day time period, assuming arguendo that the months of collation and investigation could have been compiled and presented prior to May 15, 1986, is also shown by the experiences of three of the Petitioners. Davis was an unsuccessful applicant for registration. Davis timely filed a grievance and alleges generally favoritism in the selection process. Davis' grievance

provides in relevant part: "Of the 15 women who were first chosen for registration they were all related or close friends of such people as Local 63 president, Local 63 dispatch, Local 63 committee member, Local 13 committee member, and PMA committee member."

In a letter of July 19, 1985, Davis was notified that her appeal was denied. Young was a member of the registration committee which heard the appeal of Davis on or about July 19, 1985. Young testified in his deposition that the committee "did not feel she had a §13 grievance." Young believed Davis was vague as to her allegations and she wasn't very specific to §13. Wasserman and Schreiner presented §13 claims to the Port LRC in which they alleged favoritism and nepotism in the selection process. Both individual

appeals were pending before the Port LRC at the time the case was submitted to the Ninth Circuit.

Viewing the evidence in the light most favorable to Petitioners, there are genuine issues of material fact concerning the futility or lack of neutrality of the Port LRC who would have heard Petitioners' non-§13 claims had they been presented on or before May 15, 1986.

The proper focus of the futility argument should be during the time period May 5 through May 15, 1986, the relevant time period to file appeals. The details of the identities of those registered was not known during the 10 day appeal period; the identities of those individuals who would hear appeals was not known; and the specific family connections between those who would hear appeals and

those who were registered was not known. The information regarding family connections of those registered was not easily obtained. The Port LRC has never published or made available to anyone other than union or PMA officials an entire or partial list of those applicants who were registered as either a longshoremen or a clerk during the 1984-85 registration process.

3. Exhaustion of §13 claims was futile.

Appellees argued to the district court that resort to the grievance and arbitration process in the collective bargaining agreement is not futile. Appellees argued that an individual's right to pursue §13 claims to the Coast Arbitrator insulates Appellees from a claim that the grievance and arbitration

THE
JOURNAL
OF
THE
AMERICAN
MEDICAL
ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL.
1914

CONTENTS
ORIGINAL ARTICLES
SYMPTOMS OF
TUBERCULOSIS
IN THE
LUNG
BY
J. H. HARRIS
SYMPTOMS OF
TUBERCULOSIS
IN THE
LUNG
BY
J. H. HARRIS
SYMPTOMS OF
TUBERCULOSIS
IN THE
LUNG
BY
J. H. HARRIS

SYMPTOMS OF
TUBERCULOSIS
IN THE
LUNG
BY
J. H. HARRIS

procedures are futile. However, in the present petition, this claim should be rejected. Under the specific terms of the collective bargaining agreement, the Port LRC has original jurisdiction over §13 and non-§13 claims. As such, the Port LRC's neutrality is at issue irrespective of the availability of further levels of appeal.

Secondly, the present petition presents contract claims which are not §13 discrimination claims. The decision of the Port LRC on Petitioners' contract claims or non-§13 claims is final and binding. Grievants can pursue only their §13 claims to the Coast LRC and to the Coast Arbitrator. However, the Coast LRC's consent to an arbitration before the Coast Arbitrator is required.

For example, Petitioner Wasserman presented §13 claims to the Port

LRC. Wasserman's grievance alleged favoritism and nepotism in the selection process. The Port LRC rejected these claims. Wasserman appealed to the Coast LRC. The Coast LRC remanded the matter back to the Port LRC to conduct a hearing on Wasserman's claims. A §13 grievance hearing was conducted by the Port LRC in October of 1985. No decision had been rendered. Therefore, the Wasserman situation is instructive. There is no guarantee in the collective bargaining grievance procedure that grievant's §13 grievance will be heard by any entity other than the Port LRC.

Davis also presents an instructive example of situations showing the futility of appealing a §13 grievance. Davis received no notification of her appeal rights from the denial of a §13

grievance which was based upon favoritism in the selection process. Davis was required by the Coast LRC to receive notification of her rights of appeal from the denial of a \$13 grievance.

B. The Grievance and Arbitration Procedures are Inadequate in Situations such as this which Involve a Fundamental Challenge to the Registration Process.

An additional exception to the exhaustion rule is that the process and remedies must be adequate. Republic Steel Corporation v. Maddox, supra at 653, 85 S.Ct. at 616. Williams v. Pacific Maritime Association, supra at 1328 and n.13. In the instant matter, neither the procedures nor the remedies available in the grievance and arbitration process are adequate to address the merits of the claims of the



Petitioners.

Discovery of the application and supporting documents of the successful applicants is critical to proving the merits of the contentions of the Petitioners. Once the applications and supporting documents are obtained, the merits of the various contentions of the Petitioners can be verified. The accuracy of the information contained on the successful applicants' applications and supporting documents can be verified through employers and school records. Family connections can be verified by the addresses, and if necessary, drivers' licenses.²² Until the application and supporting documents are obtained through

²² An example of a completed application and the information requested on such an application is in the record.



the discovery process, the merits of the contentions cannot be conclusively proven.

The Petitioners' grievances allege a breach of various sections of the collective bargaining agreement (non-§13 grievances), and Plaintiffs' §13 grievances. Both grievances are originally considered by the Port LRC. The Port LRC does not permit an employee to be represented by an attorney. Additionally, there is no pre-hearing discovery permitted in §13 grievances, and by implication, non-§13 grievances.

At the Port level, parties do not have the power to compel by subpoena or otherwise the production of documents or appearance of witnesses. The Coast Arbitrator does not have the power to subpoena witnesses or documents according to the deposition testimony of Inter-

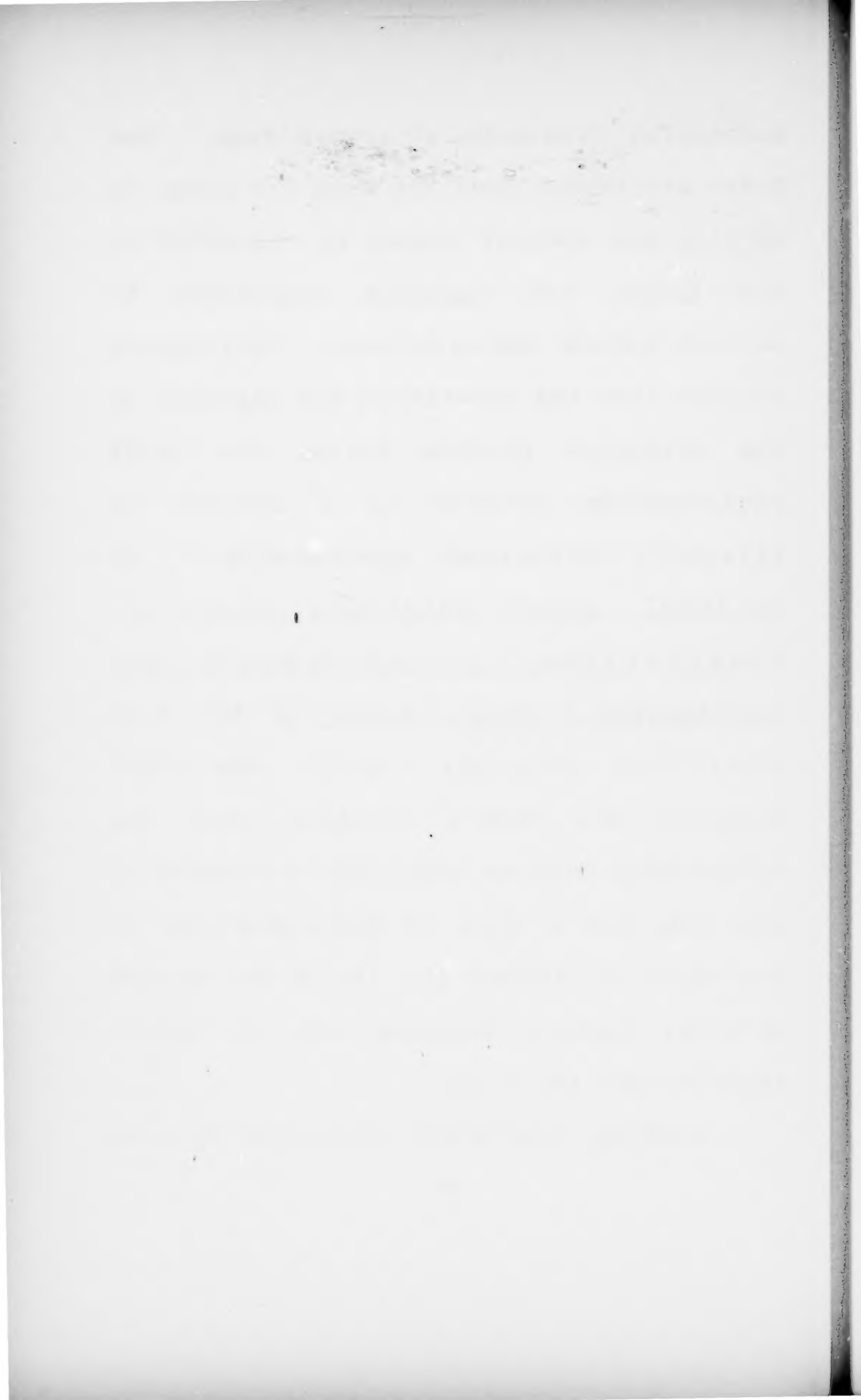
national Vice President Rubio, and PMA Vice President Holtgrave believe otherwise.

Pre-hearing discovery is essential in this type of case. Even if the Coast Arbitrator was able to subpoena records to an arbitration, the Petitioners would be limited to attacking the validity of the documents on their face. Obviously, the Petitioners would have insufficient time to conduct the necessary investigation to determine the validity of the statements contained in the application and the supporting documents from the successful applicants.

Moreover, the arbitrator's powers are limited strictly to the application and interpretation of the agreement as written. See PCLCD §17.52, and Williams v. Pacific Maritime Association, supra at 1328 n.13. The arbitrator has no power to award

successful grievants attorneys fees. The Coast Arbitrator does not have the power to appoint the special master as requested in the Brooks and Checkers complaints to control future registrations. Petitioners contend that the favoritism and nepotism in the selection process during the 84-85 registration process is a revisit to illegally disguised sponsorship. In National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, Local 13 549 F.2d 1346, 1351 (9th Cir. 1977), the Court enforced the NLRB's findings that the sponsorship program required in Harbors at one time was a form of discrimination in violation of §§8(b) (1) (A) & (2) of the National Labor's Relation Act, 29 U.S.C. §§158(b) (1) (A) & (2).

Finally, the Ninth Circuit's Opinion



contradicts this Court's decision in Maddox and Hines. Both Maddox and Hines require that some attempt be made to exhaust contractual grievance procedures prior to bringing an enforcement suit. This Court has not described with any degree of specificity the nature of the requisite attempt. In this particular matter, Judge Hall's dissent clearly describes the efforts of Petitioners in attempting to exhaust the collective bargaining grievance procedure. (Slip Op. Appendix p.50a et seq.) It was virtually impossible to establish persuasive evidence of nepotism and favoritism within the registration process within the ten day filing period.

Moreover, the details of the identities of those registered was not known during the 10 day appeal period; the identities of those individuals who would

1

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that there are three main theories: the theory of spontaneous generation, the theory of panspermia, and the theory of abiogenesis. Each of these theories is discussed in detail, and the evidence for and against each is presented.

The third part of the paper is devoted to a discussion of the evidence for the origin of life. It is shown that there is a great deal of evidence in favor of the theory of abiogenesis. This evidence includes the discovery of the fossil record, the discovery of the chemical evolution of life, and the discovery of the genetic code.

The fourth part of the paper is devoted to a discussion of the implications of the origin of life. It is shown that the origin of life has important implications for our understanding of the universe and for our understanding of ourselves. It is also shown that the origin of life has important implications for the search for life on other planets.

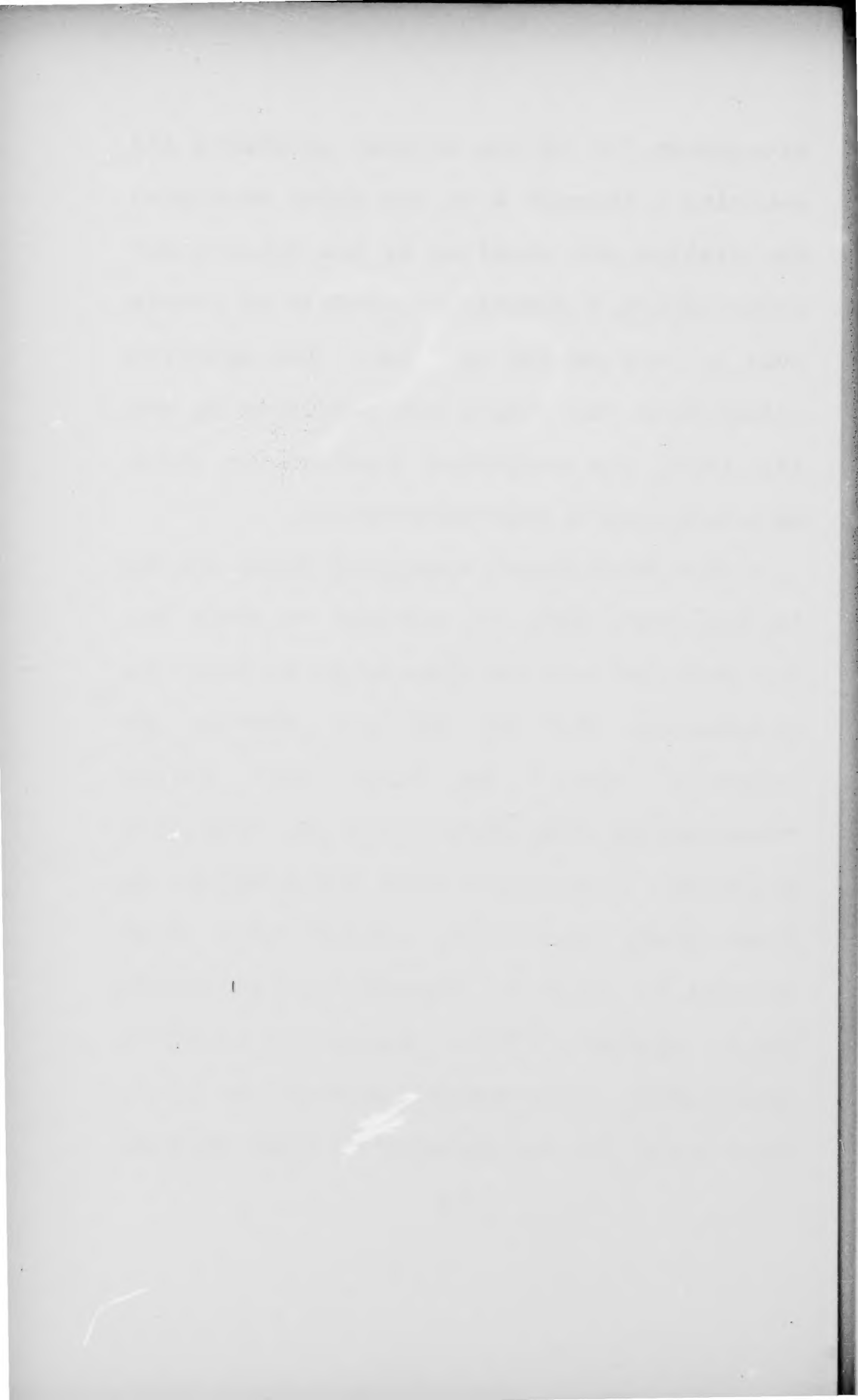
hear appeals was not known; and the specific family connections between those who would hear appeals and those who were registered was not known. The record describes the collaborative efforts of the Petitioners in discovering the information which is identified in attachment "B" to the amended grievance, and the extensive exhibits attached to the Frank Rodriguez declaration.

The information regarding family connections of those registered was not easily obtained. The Port LRC has never published or made available to anyone other than union or PMA officials an entire or partial list of those applicants who were registered as either a longshoremen or a clerk during the 1984-85 registration process.

The information contained in

attachment "B" to the amended grievance and exhibits 1 through 4 to the Frank Rodriguez declaration was obtained by the Petitioners interviewing a substantial number of people over a long period of time. The specific information was simply not available by May 15, 1985, the purported deadline in which to appeal one's non-registration.

The Petitioners submitted their claims to the Port LRC; it refused to hear it. The Port LRC had the discretion to hear the grievances for up to six months; it rejected them. As Judge Hall notes: "Considering the difficulty in obtaining evidence, Plaintiffs' good faith effort to file their grievance should have been allowed." (Slip Op. Appendix p.57a.) Judge Hall states, "The majority treats appellants' unsuccessful attempt as if it were equal to no attempt!!! Thus barring



Petitioners' complaint. (Slip Op. Appendix p.53a & 54a.)

Petitioners attempt to pursue the contractual remedies was sufficient to satisfy the Maddox requirements. Genuine issues of material fact exist as to the adequacy of the remedies and procedures in the grievance procedure concerning the issues presented in this appeal.

C. The Grievance Procedure is not Speedy.

In this action, the Petitioners' group grievances were filed in October of 1985. The attorney for Petitioners received a response from the Port LRC on April 14, 1986, denying the grievances on the grounds of timeliness. Pursuant to the notice from the Port LRC, an appeal was filed to the Coast LRC. On May 1, 1986, the Petitioners were advised by the Coast LRC that their



grievances were denied as being untimely. Pursuant to the notice of the Coast LRC, an appeal to the Coast Arbitrator was filed, and the Coast LRC notified Petitioners on May 16, 1986 that an arbitration before the Coast Arbitrator was scheduled.

The parties agreed to submit to the Coast Arbitrator, Sam Kagel, the evidence supporting their respective contentions by July 16, 1986. On or before August, 1986, the parties agreed to mail their respective legal briefs to the Coast Arbitrator. By agreement of the parties, the deadline for submitting briefs was extended to August 8, 1986. The arbitrator did not rule until January 15, 1987. Thus, the timeliness of Petitioners' §13 grievances was not determined for a period of 15 months from the initial submission of the grievances in October, 1985.

Moreover, the grievance procedure is not designed to speedily resolve the types of claims presented by Petitioners in this action. Assuming that the Petitioners' claims had been presented to the Port LRC prior to May 15, 1985 with the degree of specificity of the October, 1985 grievances, the Port LRC would have original jurisdiction over the claims. The Petitioners could only appeal the non-§13 claims. Their evidence concerning §13 claims would then be presented to the Coast LRC should there be an appeal, and if permitted by the Coast LRC, to the Coast Arbitrator. Such a process would obviously exhaust even the most intrepid, patient and financially solvent grievant.

Finally, neither Petitioners Wasserman nor Schreiner had received notice from the Port LRC of the final disposition of their



claims of favoritism and nepotism in the selection process from the Port LRC at the time the case was submitted to the Ninth Circuit. Schreiner's individual grievance has been pending since July of 1985, and Wasserman's grievance has been pending since October of 1985. Genuine issues of material fact exist as to whether the grievance procedure is speedy when the claims presented in this appeal are involved.

Judge Hall notes in dissent that the unreasonable delays in the process both "[I]lluminates the fundamental procedural inadequacy of the grievants and arbitration procedure to deal with a large class related grievances arising out of an allegedly discriminatory registration process." (Slip Op. Appendix p.58a).



1
D. The Union's Breach of its Duty
of Fair Representation Excuses
any Claim of Exhaustion as a
Defense.

The Opinion conflicts with this Court's observation in Vaca v. Sipes, supra at 186, 87 S.Ct. at 914 that Congress did not intend "[T]o shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." In this case, the Petitioners have been left remediless.

The Unions herein owe a duty of fair representation to the employees in the bargaining units represented by the ILWU, Locals 13 and 63. This statutory duty to fairly represent all of the employees in the bargaining unit applies to the collective bargaining with the employer,

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
JANUARY 1950

TO THE HONORABLE CHAIRMAN OF THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF CHICAGO
FROM THE DEPARTMENT OF CHEMISTRY
SUBJECT: REPORT ON THE PROGRESS OF RESEARCH
DURING THE YEAR 1949
The following report summarizes the work done in the Department of Chemistry during the year 1949. It is divided into two main parts: a summary of the work of the individual members of the department and a summary of the work of the department as a whole. The first part is divided into three sections: a summary of the work of the members of the department who were present at the meeting of the Board of Trustees on January 19, 1950; a summary of the work of the members of the department who were absent from the meeting; and a summary of the work of the members of the department who were not present at the meeting. The second part is a summary of the work of the department as a whole, and is divided into three sections: a summary of the work of the department in the field of organic chemistry; a summary of the work of the department in the field of inorganic chemistry; and a summary of the work of the department in the field of physical chemistry.

and in the Union's enforcement of the resulting collective bargaining agreement. Vaca v. Sipes, supra at 177, 87 S.Ct. 909-910.

The Union owes a duty of fair representation to all Petitioners, except those 16 Petitioners who did not work as casual longshoremen or clerks during the relevant time period, and who were not employed in Local 63's office clerical division.²³

The exhibits attached to the Rodriguez declaration show the blatant favoritism in the selection process. The relationship between the successful registrants and past and present Union officials or members are

²³ The Coast minutes of August 10, 1984 include the categories of casuals as individuals who are included within the definitions of longshoremen in (1.91 of the PCLCD, and the definition of clerk in (1.71 of the PCCCD.

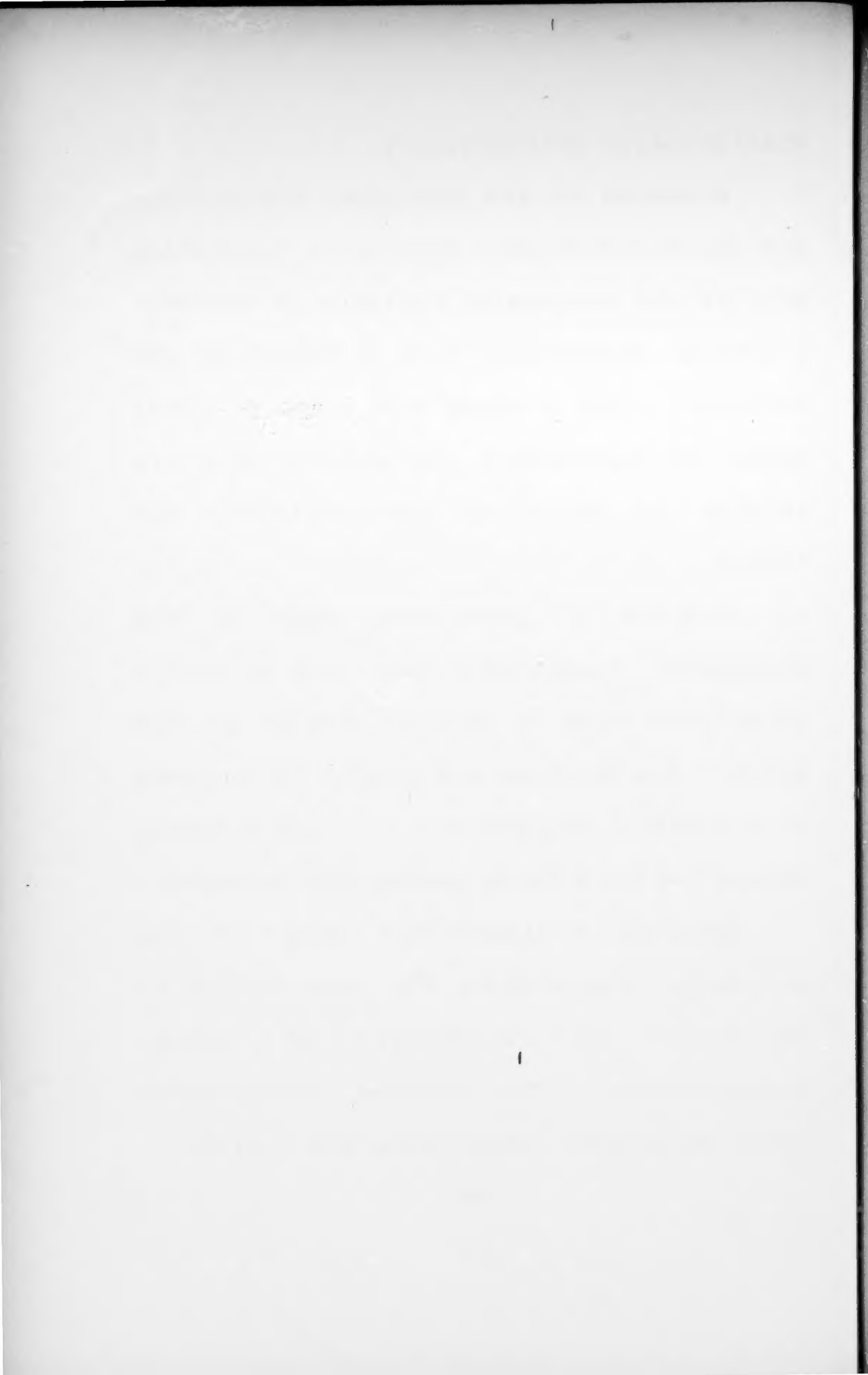


statistically extraordinary.

Attached to the Rodriguez declaration are three exhibits. Exhibit 1 identifies many of the successful registrants who have a family connection with a Union or PMA official. One hundred and nineteen (119) names of successful registrants who are related to Union or PMA officials are listed.

Exhibit 2 identifies many of the successful registrants who have a family connection with a current member of the Union. One hundred and ninety (190) names of successful registrants who have a family connection to a Union member are included.

Exhibit 3 identifies many of the successful registrants who have little or no hours of experience as casual longshoremen. Two hundred twenty-three (223) successful registrants are listed.



Finally, the statistical information presented in the Frank Rodriguez declaration is even more remarkable when considered in the context of the registration. Approximately 30,000 applications were handed out for registration as a longshoreman or clerk. Approximately 22,250 of the applications were returned. Four hundred and ten (410) individuals were originally registered as longshoremen, and between fifty eight (58) and sixty (60) individuals were registered as clerks. As of April 20, 1987, one hundred and nineteen (119) of the four hundred and seventy (470) individuals who are registered have a family connection to PMA or Union officials. An additional one hundred and ninety (190) successful registrants have a family connection to current Union members. Thus, approximately



twenty-five percent (25%) of those registered had a family connection to PMA or Union officials. Three hundred and nine (309) of the four hundred and seventy (470) successful applicants, or over sixty percent (60%), have a family connection to PMA or Union officials or members.

Genuine issues of material fact exist as to whether the Unions served the interests of affected Petitioners without hostility or discrimination, with complete good faith and honesty, and without arbitrary conduct. Vaca v. Sipes, supra at 177, 87 S.Ct. 909-10.

E. Repudiation of Contract
 Grievance and Arbitration Pro-
 cedures by Defendants Permit
 Judicial Review of Plaintiffs'
 Breach of Contract.

An employee can obtain judicial review

of his breach of contract claim despite his failure to pursue contractual remedies where the conduct of the employer amounts to a repudiation of those procedures. Vaca v. Sipes, supra at 185, 87 S.Ct. at 914. In such a situation, an employer is estopped by his own conduct in asserting exhaustion as a defense. Id. For the same reason, a Union is estopped from raising exhaustion as a defense if it repudiates the contractual remedy procedures. In this action, Respondents are estopped by their own conduct from asserting exhaustion of the collective bargaining grievance procedure as a defense.

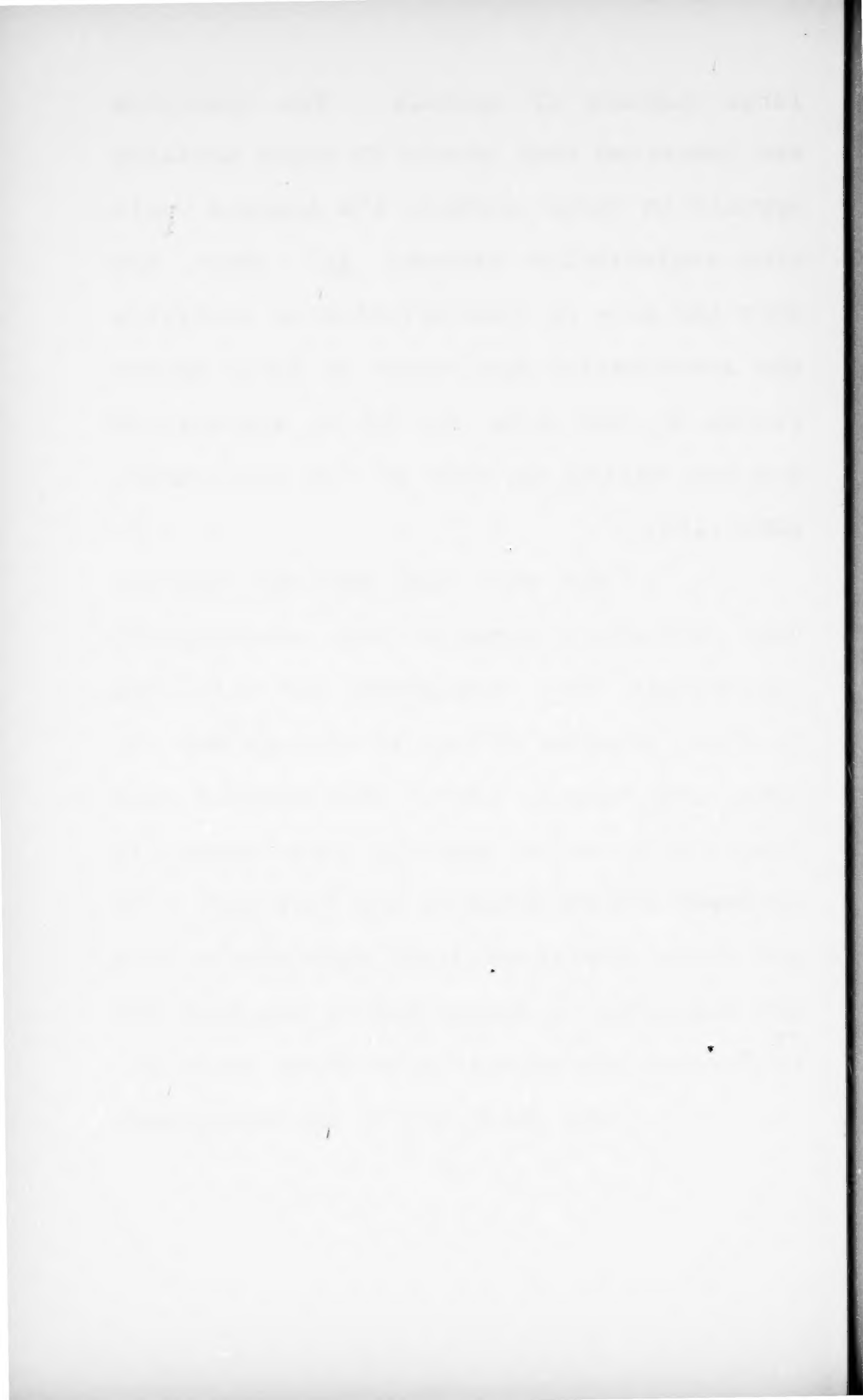
1. The Port LRC Discouraged Appeals.

PMA area manager Lane testified that the Port LRC did not wish to solicit

large numbers of appeals. The Committee was concerned that should it begin handling appeals in large numbers, the appeals would stop registration process. Id. Thus, the Port LRC gave no consideration to notifying the unsuccessful applicants of their appeal rights at the time the \$5.00 application fee was mailed to each of the applicants. (CR35:215).

The Port LRC meetings wherein the individual appeals from unsuccessful registrants were considered and reflected in their minutes of May 20 through May 30, 1985, and July 9, 1985. The minutes show that registration appeals were summarily reviewed and rejected by the Port LRC. PMA and Young testified that individuals were not requested to appear before the Port LRC to discuss the substance of their appeals.

The Port LRC's discouragement



of appeals is also reflected in individual instances involving the Petitioners. Davis was notified on July 19, 1985, that her appeal was denied. The Davis grievance specifically alleges favoritism in the selection process and gives general examples. The Port LRC denied Davis' grievance on the grounds that it was not a §13 grievance. Moreover, the Coast LRC requires a §13 grievant to be notified in writing of his or her appeal rights by the Port LRC when the Port LRC denies a §13 grievance. The Port LRC failed to notify Davis of further avenues of appeal in the notice of denial.

The declarations of Petitioners Wasserman and Schreiner show that nepotism and favoritism in the registration process were raised in their individual grievances. To date, both grievances are pending before

the Port Committee.

Therefore, Respondents are estopped from the action of the Port LRC from asserting exhaustion as a defense. The Port LRC or its members have actively discouraged appeals, summarily rejected appeals, failed to notify individuals of further appeal rights, and ignored appeals.

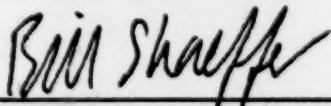
CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

DATED: November 20, 1990
Newport Beach, CA

Respectfully submitted,

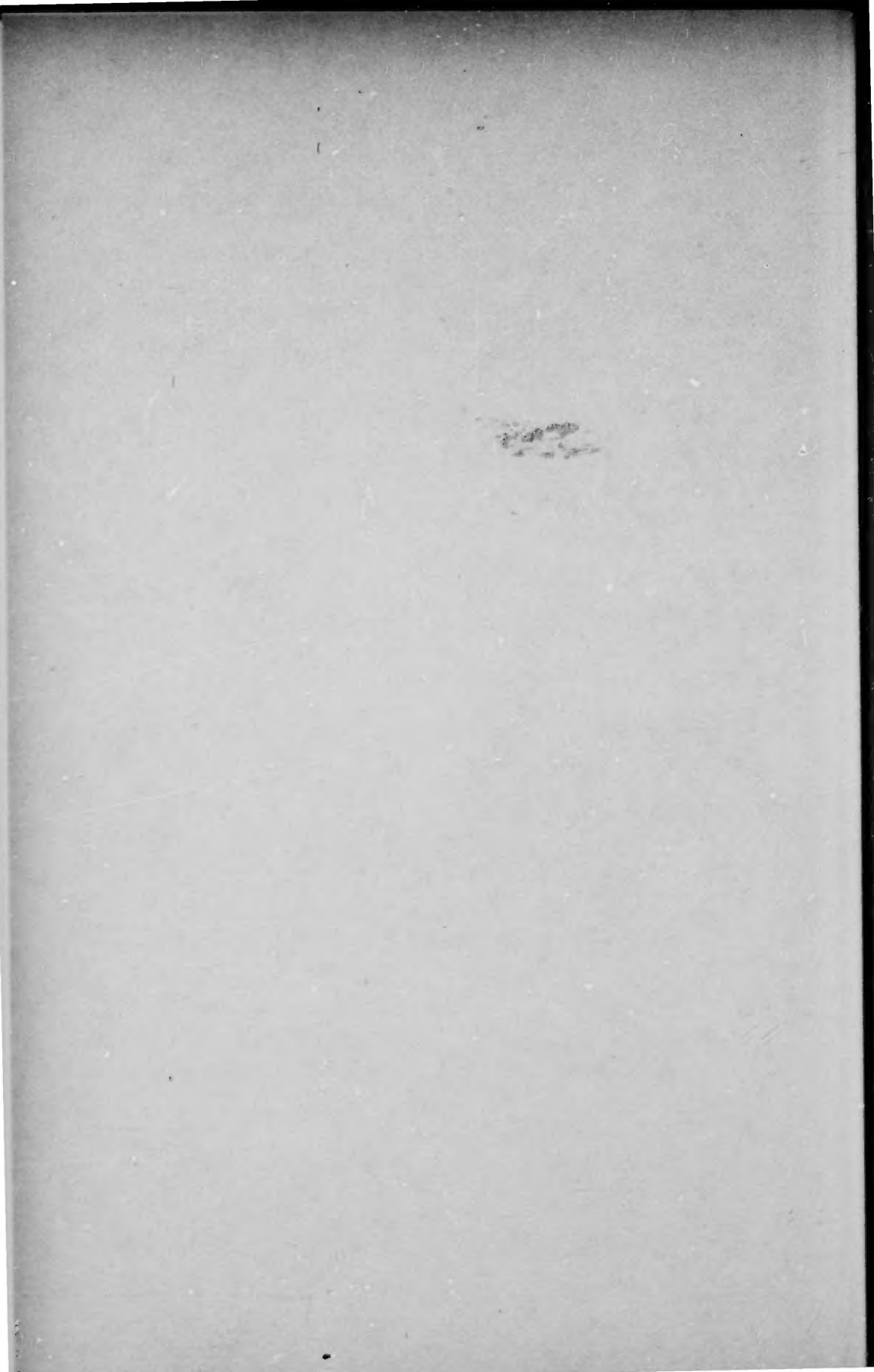
SILVER, GOLDWASSER & SHAEFFER
A Professional Law Corporation

By 

GEORGE W. SHAEFFER, JR.
Attorneys for Petitioners

A0306.PET

APPENDIX



FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CARR, et al.,

Plaintiffs-Appellants,

Nos. 87-6137
87-6497

v.

PACIFIC MARITIME ASS'N,
et al.,

D.C. Nos.
CV-85-7243 FFF
CV-86-0345 FFF
CV-86-1859 FFF

Defendants-Appellees.

OPINION

GREG BROOKS, JURY CHECKERS,
et al.,

Plaintiffs-Appellants,

v.

PACIFIC MARITIME ASS'N,
et al.,

Defendants-Appellees.

Appeal from the United States District
Court for the Central District of California

Ferdinand F. Fernandez, District
Judge, Presiding

Argued and Submitted

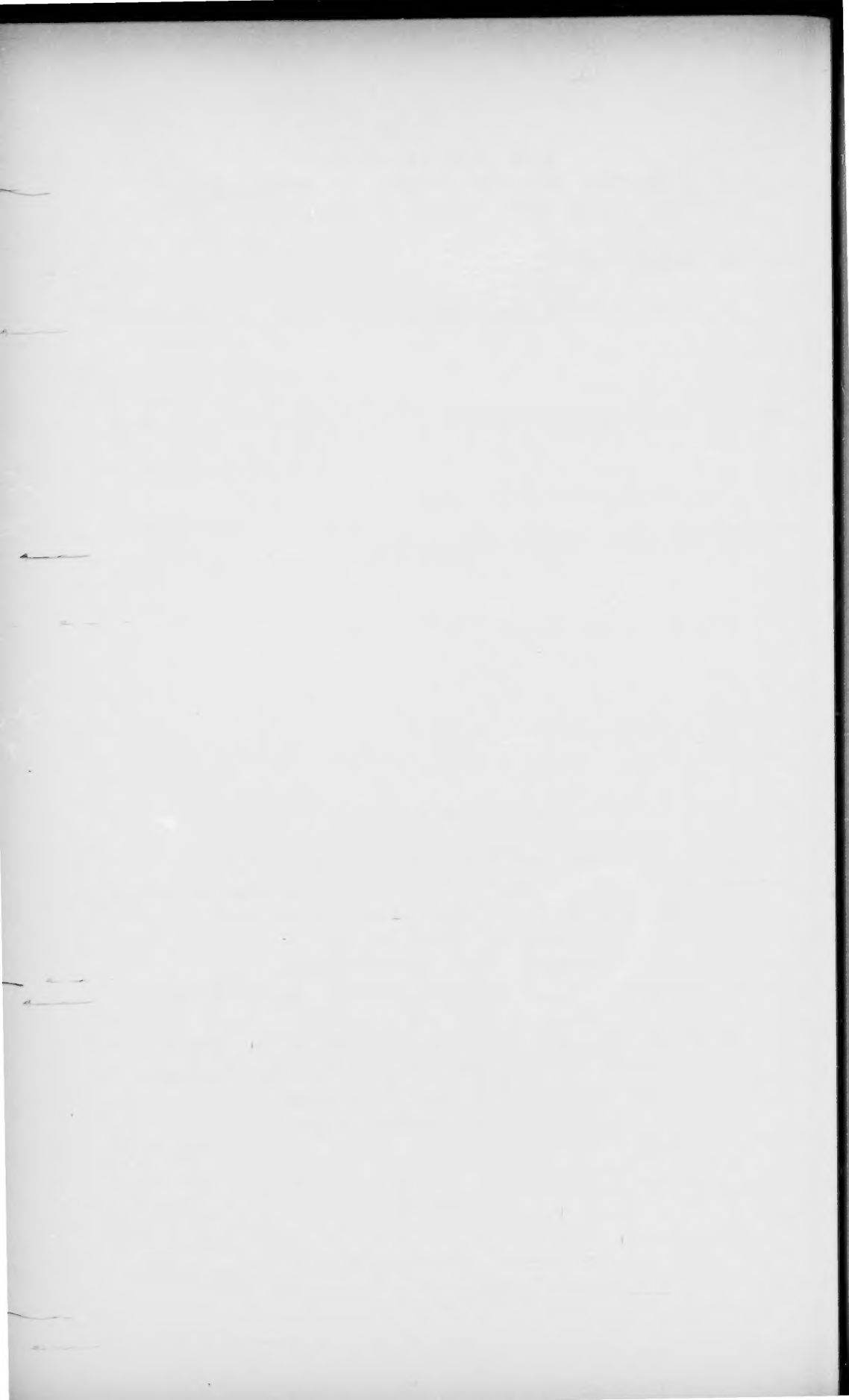
September 16, 1988-Pasadena, California

Filed May 21, 1990

Before Wm. A. Norris, Cynthia H. Hall
and Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski;

Dissent by Judge Hall



KOZINSKI, Circuit Judge:

Applicants for registration as class B longshoremen and clerks seek damages and injunctive relief, claiming that the registration process was tainted by nepotism, favoritism and discrimination. The district court found that the applicants failed to exhaust contractual grievance procedures and that their failure was not excused. Plaintiffs appeal the district court's grant of summary judgment and dismissal of their action. We review the district court's grant of summary judgment de novo. Darring v. Kincheloe 783 F.2d 874, 876 (9th Cir. 1986).

I. FACTS

Plaintiffs are 128 casual longshoremen and clerks whose applications for registration as class B longshoremen or clerks in the Los Angeles area were

rejected.¹ Defendants are the Pacific Maritime Association (PMA), an association of West Coast stevedoring, shipping and terminal companies; the International Longshoremen's and Warehousemen's Union (ILWU), the exclusive bargaining representative of longshoremen and clerks who work for PMA members; ILWU Local 13 (Local 13), the chartered, affiliated local of the ILWU for longshoremen in the Los Angeles area; and ILWU Local 63 (Local 63), the chartered, affiliated local of the ILWU for clerks in the Los Angeles area. Defendants are parties to the Pacific Coast

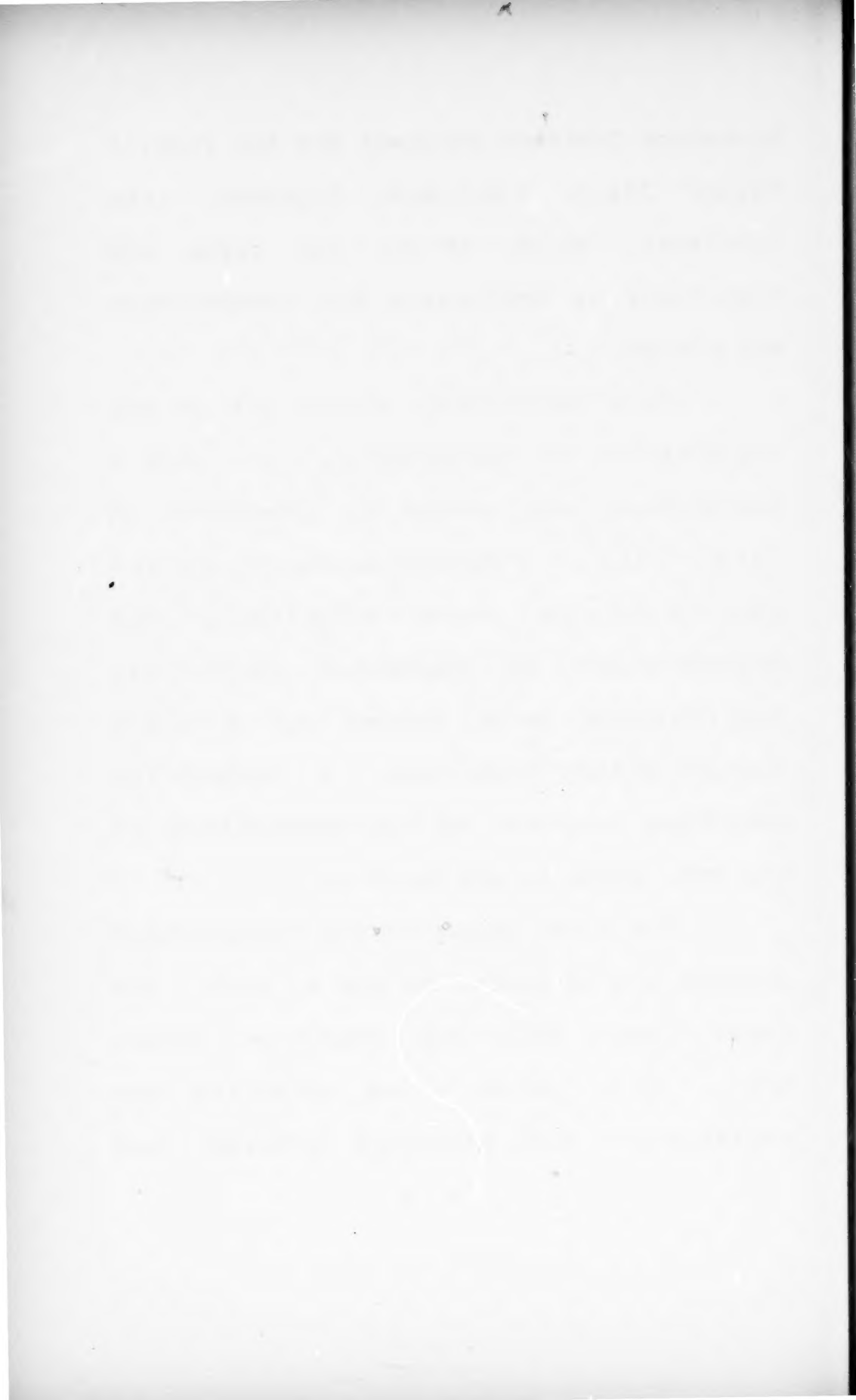
¹ Three groups brought suit: The Carr Group (109 unsuccessful Class B union registrants) filed suit on November 5, 1985; the Brooks Group (11 unsuccessful Class B union registrants) filed suit on January 15, 1986; and the Checkers Group (8 unsuccessful Class B union registrants) filed suit on March 24, 1986. These three actions have been consolidated on appeal.



Longshore Contract Document and the Pacific Coast Clerk Contract Document (the Contract), which govern the terms and conditions of employment for longshoremen and clerks.

This controversy arises out of the registration of approximately 387 class B longshoremen and clerks by defendants in late 1984. Approximately 22,250 applications were submitted for registration by September 26, 1984. Applications were scored by a Joint Registration Committee, a tripartite committee composed of representatives of the PMA, Local 13 and Local 63.

The first phase of the registration process was completed on May 4, 1985. The Coast Labor Relations Committee (Coast LRC), which issues rules governing the registration and grievance process, had



established a ten-day grievance filing period to commence upon completion of the registration process. On May 6, 1985, notices were posted in the longshore, clerk and casual dispatch halls notifying individuals that the initial phase of the registration had been completed, and that appeals would be considered timely if received by the Joint Port Labor Relations Committee (Port LRC) on or before May 15, 1985. The Port LRC received 318 timely grievances.

On October 23, 1985, more than five months after the close of the grievance filing period, 109 unsuccessful registrants (the Balsley Group) filed their First Amended Statement of Grievance with the Port LRC. They alleged favoritism, nepotism, arbitrary scoring and coaching of applicants (non-section 13 Contract claims)

THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

RECEIVED

APRIL 10 1954

FROM

DR. J. H. DILLON

AND

DR. J. H. DILLON

TO

DR. J. H. DILLON

AND

DR. J. H. DILLON

TO

DR. J. H. DILLON

AND

DR. J. H. DILLON

TO

DR. J. H. DILLON

AND

DR. J. H. DILLON

and discrimination on the basis of non-union membership (section 13 Contract claims) by the Joint Registration Committee. They also alleged violations of Local 13's and Local 63's duty of fair representation, and a breach of the collective bargaining agreement by all defendants.

Under the terms of the Contract,² the Port LRC resolves all non-section 13 claims. Its decision is final and binding

² Section 11 of the Coastwise Registration Rules, adopted by the Coast LRC on August 10, 1984, provides that the grievance procedures set forth in the Contract "shall be the exclusive remedy with respect to any disputes involving registration or deregistration...[of] persons working or seeking to work under this Agreement....No other remedies shall be utilized by any persons with respect to any dispute involving registration or deregistration until the grievance has been exhausted." Coastwise Registration Rules, §11 (August 10, 1984), quoted in David Balsley, et al., Arbitrator's Decision at 7 (January 15, 1987) (Kagel, Arb.).

on all parties, unless there is disagreement between the union and management members of the Port LRC, in which case an appeal to the Coast LRC is allowed. See Contract §17.24.

Section 13 claims are processed pursuant to section 17.4 of the Contract. All section 13 claims must be filed within ten days of the alleged discriminatory incident. Contract §17.41. The Port LRC has direction to extend the deadline for filing section 13 claims up to six months from the date of the alleged discriminatory act "to prevent inequity." Contract §17.411. The Port LRC's decision may be appealed to the Coast LRC, provided the request for review is made within seven days of the Port LRC's decision. Contract §17.42. The Coast LRC's decision is further appealable to the Coast Arbitrator,



again under the condition that the appeal be made within seven days of the Coast LRC's decision. Contract §17.43. Neither the Port LRC, the Coast LRC nor the Coast Arbitrator can extend the latter two periods or the period for challenging non-section 13 claims.

On April 11, 1986, the Port LRC ruled that the Balsley Group's section 13 and non-section 13 claims were time-barred. The Port LRC also rejected the grievants' request that it extend the filing deadline for the section 13 claims to six months.

The Balsley Group appealed its section 13 claims to the Coast LRC on April 17, 1986.³ On May 1, 1986, the Coast LRC

³ Two other groups filed grievances with the Coast LRC, incorporating by reference the allegations made in the Balsley Group grievance. The Checkers Group filed on March 25, 1986; the Brooks Group filed on January 16, 1986. Neither



held that the group's section 13 discrimination claim was time-barred. The Coast LRC also ruled that the Port LRC did not abuse its discretion by refusing to extend the filing period for the section 13 claims.

The Balsley, Brooks and Checkers Groups filed a consolidated appeal before the Coast Arbitrator in May 1986. The parties stipulated that the only issue before the Coast Arbitrator was the timeliness of their section 13 claims. District court proceedings were stayed pending the Coast Arbitrator's decision.

On January 15, 1987, the Coast Arbitrator held that the grievants' section

group filed a group grievance with the Port LRC before pursuing their remedies with the Coast LRC. The grievances of both groups were found to be time-barred by the Coast LRC.



13 discrimination claims were time-barred. He found that the grievants either knew or should have been aware of allegations of nepotism, favoritism and discrimination in the registration process prior to the May 15, 1985, filing deadline. The Coast Arbitrator concluded that the allegations made in the October 23, 1985, amended grievance could have been raised in a timely manner. The Coast Arbitrator found that the Port LRC did not abuse its discretion in deciding not to extend the filing deadline for section 13 claims.

The district court granted summary judgment for defendants in all three actions.⁴ The district court refused to

⁴ See Carr v. Pacific Maritime Ass'n, No. CV 85-7243-FFF (C.D.Cal., filed June 3, 1987); Brooks v. Pacific Maritime Ass'n, No. CV 86-345 FFF (C.D.Cal. Sept. 29, 1987); Checkers v. Pacific Maritime Ass'n, No. CV 86-1859 FFF (C.D.Cal. Sept. 29,

excuse plaintiffs' failure to exhaust their contractual remedies and dismissed their claims for breach of collective bargaining agreements and for breach of the union's duty of fair representation under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (1982).⁵

II. DISCUSSION

[1] A. As a general rule, members of a collective bargaining unit must first exhaust contractual grievance procedures before bringing an action for breach of the collective bargaining agreement. See, e.g., Clayton v. UAW 451 U.S. 679, 686 (1981). This requirement applies with equal force to claims brought against a

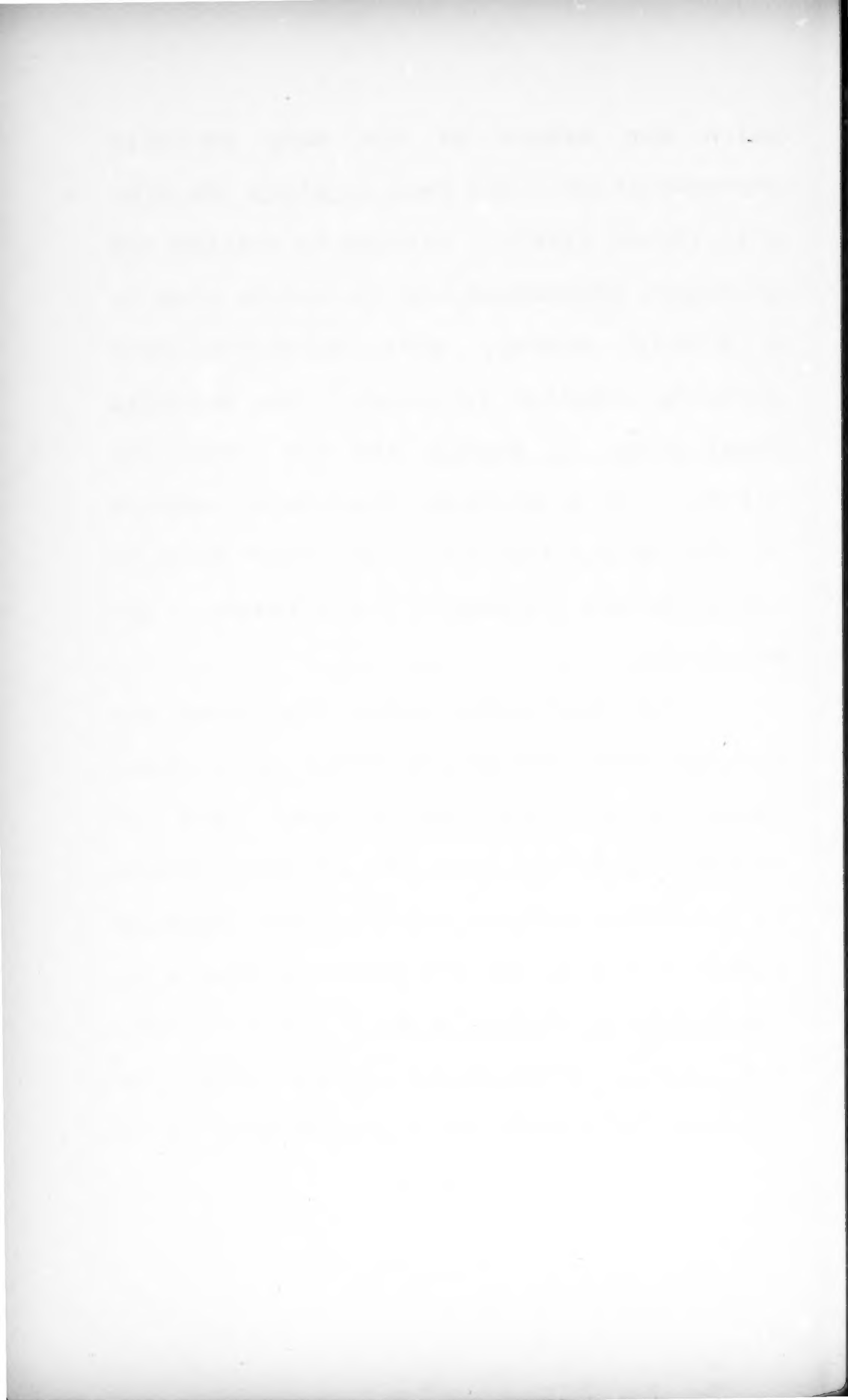
1987).

⁵ The district court dismissed without prejudice claims by plaintiffs whose grievances were timely filed.



union for breach of the duty of fair representation. See Vaca v. Sipes 386 U.S. 171, 184-85 (1967). Failure to utilize the grievance procedures, or to invoke them in a timely manner, bars grievants from pursuing remedies in court. See Republic Steel Corp. v. Maddox 379 U.S. 650, 652 (1965). At a minimum, therefore, members of the bargaining unit must first turn to the grievance procedures for a remedy. Id. at 652-53.

[2] Plaintiffs argue that they are excused from exhausting their contractual remedies because the alleged lack of neutrality of the Port LRC rendered resort to grievance process futile. See Republic Steel, 379 U.S. at 652 (quoting Steele v. Louisville & Nashville Ry., 323 U.S. 192, 206 (1944) ("employees should [not] be required to submit their controversy to 'a



group which is in large part chosen by the [defendants] against whom their real complaint is made'")); see also Williams v. Pacific Maritime Ass'n, 617 F.2d 1321, 1328 n.13 (9th Cir. 1980)(dicta), cert. denied, 449 U.S. 1101 (1981). We have held, however, that a plaintiff waives his right to claim bias on the part of the grievance committee unless he raises the objection when the committee convenes. Sheet Metal Workers International Ass'n Local 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985). This is the rule in several other circuits as well. See e.g., Early v. Eastern Transfer, 699 F.2d 552, 558 (1st Cir.), cert. denied, 464 U.S. 824 (1983); Cook Industries, Inc. v. C. Itoh & Co., Inc., 449 F.2d 106, 107-08 (2d Cir. 1971), cert. denied, 405 U.S. 921 (1972); United Steelworkers of America Local 1913



v. Union Railroad Co., 648 F.2d 905, 913-14
(3d Cir. 1981).

[3] In Kinney, plaintiffs attempted to overturn an unfavorable arbitration award on the theory that the grievance process was biased. We held that plaintiffs had waived their bias claim because they had not objected to the makeup of the arbitration board at the time of the grievance procedure. Kinney, 756 F.2d at 746. The rule of Kinney is easily extended to this case.⁶ Here, plaintiffs failed to

⁶ The dissent argues that this case is distinguishable from Kinney because "appellants are not signatories to the applicable collective bargaining agreement," and therefore "had no direct say in the establishment of procedures for selecting panelists who would hear and impartially decide their grievances." Dissent at 5125. This seems to us irrelevant. It will almost always be true that a grievant will not be a signatory to the collective bargaining agreement; by virtue of representation, individual union members rarely have much of a direct say in



object in a timely manner to alleged bias in the Port LRC. Moreover, they did not attempt to use the grievance procedure within the specified time limits. Yet they come to court now claiming that such

the procedures set up to arbitrate grievances. Surely the Kinney rule is not limited to signatories to the collective bargaining agreement; any grievant is capable of objecting to the composition of an arbitration panel. See e.g., United Steelworkers 648 F.2d at 913-14 (applying the rule to an individual union member); Early 699 F.2d at 558 (same). Perhaps the dissent is referring to the fact that plaintiffs are not union members. It cannot be, however, that non-members of the union have greater rights to avoid grievance procedures than union members.

The dissent also contends that plaintiffs' statement of grievance to the Port LRC may be read as an implied objection to the neutrality of the Port LRC itself. Dissent at 5125-26. This, too, is irrelevant. Plaintiffs' filed their grievance over five months after the deadline. If, at the time of the original filing deadline, plaintiffs had reason to suspect the Port LRC was biased, plaintiffs could have filed their "implied" objections timely; if they did not suspect bias at that time, they had no reason not to file.



failure should be excused because of bias in the Port LRC. It would defy logic to hold that plaintiffs, like those in Kinney, who use a grievance procedure without objection waive their right to claim bias, while those, like the present plaintiffs, who offer no objection to the procedure and fail to use it are to be afforded the protection of the courts. To allow these plaintiffs to bring their bias claim would create perverse incentives to avoid grievance procedures that would undermine our traditional deference to private dispute resolution in labor relations. Therefore, because plaintiffs did not timely notify the Port LRC that they believed the grievance procedure was

tainted, they cannot claim bias now.⁷

Appellant Nancy Davis presents a special case. She filed her grievance with the Port LRC before the close of the filing period. In her letter of April 24, 1985, to the Port LRC, Davis alleged, inter alia, nepotism, favoritism and coaching of favored applicants. The Port LRC rejected her claim without notifying her of her right to appeal any section 13 claims she might have presented. The Coast Arbitrator, in interpreting the Contract, apparently found that Davis had raised a

⁷ Contrary to the dissent's assertions, we do not require that plaintiffs have "exhausted the grievance procedure," or that they "go through the[] entire" process. Dissent at 5126-27. To preserve their bias/futility claim, plaintiffs simply needed to notify the Port LRC in a timely manner that they believed the grievance procedure was biased so that the Port LRC might have an opportunity to act on that complaint.



section 13 claim, but that she had waived her right to appeal it by failing to appeal the Port LRC's decision to the Coast LRC within several days. Although a Coast LRC rule requires the Port LRC to inform all grievants who allege section 13 claims of their right to appeal to the Coast LRC, see Letter from ILWU-PMA Joint Coast Labor Relations Committee to ILWU Locals and PMA Area Offices (July 18, 1979), we cannot overturn the Coast Arbitrator's interpretation of the contract or his application of the rules issued pursuant to it. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38



(1987). We must therefore reject Davis' claim as well.

[4] B. Plaintiff's next allege that their failure to exhaust their contractual remedies should be excused because of the inadequacy of the grievance processes and remedies. They argue that the grievance mechanics are flawed because they do not provide for pre-hearing discovery, representation by counsel before the Port LRC, appointment of a special master by the Coast Arbitrator to control future registrations, or the award of attorney's fees to grievants who succeed before the arbitrator. None of these alleged flaws, however, prevented plaintiffs from at least attempting to invoke the contractual



remedies in a timely manner.⁸ At a minimum, grievants must present and prosecute their grievances through contractual procedures before complaining

⁸ The dissent argues that "[i]t was highly unreasonable to expect individuals to muster, in ten days and without any discovery, proof of pervasive nepotism and favoritism sufficient to prepare a grievance stating a claim for violation of the collective bargaining agreement." Dissent at 5128-29. But, under the collective bargaining agreement, grievants aren't required to "muster proof"; the initial filing need only set out "the facts as to the alleged discrimination." Contract §17.41. It is the job of the Port LRC to "investigate" all grievances. Contract §17.124. Three hundred and eighteen other grievants apparently had no problem meeting the 10-day requirement. This group included Carr appellant Nancy Davis, whose timely filing alleged favoritism and nepotism.

Instead of filing timely, plaintiffs conducted an independent five-month investigation. As the dissent states, "the collective bargaining agreement neither required nor forbade" plaintiffs' investigation. Dissent at 5129 n.10. But the agreement did require that plaintiffs at least notify the Port LRC that they had a complaint.



of the inadequacy of those processes. See
e.g., Hines v. Anchor Motor Freight, 424
U.S. 554, 563 (1976) (grievant cannot
"sidestep the grievance machinery...unless
he attempted to utilize the contractual
procedures for settling his dispute with
his employer"); Beriault v. Local 40, Super
Cargoes & Checkers, Int'l Longshoremen's &
Warehousemen's Union 501 F.2d 258, 262 (9th
Cir. 1974). Thus, the assertion by
plaintiffs that the grievance and
arbitration procedures were inadequate is
entirely speculative, since plaintiffs
failed to avail themselves of those
remedies in a timely manner.

[5] C. We must also reject
plaintiffs' claim that the Port LRC's
refusal to extend the filing deadline for
their section 13 discrimination claim and
its "discouragement of appeals" amounts to

a repudiation of the grievance procedure. The plaintiffs' ability to have a neutral arbitrator review the Port LRC's decision cures whatever bias there may have been in the Port LRC's decision making process. See Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 370 (9th Cir. 1988) ("any hostility that may exist at the joint coast level is cured by the availability of neutral arbitration"). As already noted, the Coast Arbitrator determined that the Port LRC's decision not to extend the deadline was not an abuse of discretion. We must accord great deference to such findings by arbitrators acting pursuant to collective bargaining procedures. See e.g., Misco, 484 U.S. at 36-38. As to the non-section 13 claims, the Port LRC had no authority to extend the filing deadline. Plaintiffs may therefore

not complain that the Port LRC abused its discretion or acted with partiality in failing to extend those filing deadlines.

The Port LRC's failure to notify applicants of their right to appeal the Joint Registration Committee's decision when applicants' registration fees were returned does not constitute repudiation of any aspect of the contract. All applications contained a notice to applicants of their right to appeal the Joint Registration Committee's decision; no other notification was required.

Nor does plaintiffs' suggestion that "registration appeals were summarily reviewed and rejected by the Port LRC," Appellants' Brief at 47, establish that the Port LRC discouraged appeals. Indeed, the fact that numerous applicants successfully appealed the Joint Registration Committee's

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

1100 SOUTH EAST ASIAN AVENUE

CHICAGO, ILLINOIS 60607

TEL: 773-936-5000

FAX: 773-936-5001

WWW.CHICAGOEDU.EDU

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

CHICAGO, ILLINOIS 60607

decision suggests that the Port LRC was more than a rubber stamp.

D. Plaintiffs also claim the union's alleged breach of its duty of fair representation excuses their failure to comply with the grievance procedures. Although plaintiffs claim that the union breached its obligation to "represent those in a designated unit, to serve their interest without hostility or discrimination, and to exercise its discretion with complete good faith, honesty, and to avoid arbitrary conduct," Appellants' Brief at 40, in essence their fair representation claim focuses not on the union itself but on the actions of the union members on the Joint Registration Committee and the Port LRC.

There are two situations in which a breach of the duty of fair representation

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

1911

excuses the exhaustion requirement: First, where "the union has sole power under the contract to invoke the higher stages of the grievance procedure, and it...the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance," Vaca v. Sipes, 386 U.S. at 185 (emphasis original); second, where grievants allege a breach of the duty of fair representation with regard to negotiating the collective bargaining agreement. See Williams, 617 F.2d at 1328.

The district court correctly found neither exception applicable. See Carr v. Pacific Maritime Ass'n, No. CV 85-7243 FFF (C.D. Cal., filed June 3, 1987); Brooks v. Pacific Maritime Ass'n, No. CV 86-345 FFF (C.D. Cal. Sep. 29, 1987); Checkers v. Pacific Maritime Ass'n, No. CV 86-1859 FFF

(C.D.Cal. Sep. 29, 1987). The first exception to the exhaustion requirement is inapplicable, because the grievants can utilize the contractual remedy process without the help or approval of the union. Thus, this case is distinguishable from those where the union has assumed sole responsibility of preparing and presenting the grievant's claim. See Vaca v. Sipes, 386 U.S. at 185. Nor is this a case where the grievants are seeking a remedy not available through the grievance procedure, such as modification of the contract. See Berriault, 501 F.2d at 266. Plaintiffs are not challenging some aspect of the registration process that cannot be corrected under existing grievance procedures; instead, they merely allege that certain union representatives on the Joint Registration Committee and the Port

LRC unfairly reviewed their applications. This allegation neither excuses plaintiffs' failure to file their grievances on time or to state their complaints with specificity, nor justifies their decision to sidestep the grievance process.

E. We do not consider plaintiffs' argument that their failure to exhaust contractual remedies is excused because of delays in the grievance process, as that allegation was not raised in the complaint. Nor could they have raised such a claim when their suits were filed, as they sought judicial relief either before or shortly after filing their group grievances. The Carr Group brought suit on November 5, 1985, eleven days after filing its amended grievance before the Port LRC; the Brooks action was filed on January 15, 1986, one day before that group submitted its

grievance to the Coast LRC; the Checkers action was filed on March 24, 1986, one day before that group filed its group grievance before the Coast LRC. Thus, plaintiffs base their assertion of unreasonable delay on what occurred after, rather than prior to, their resort to the district court.

For the same reasons, we do not consider Wasserman's and Schreiner's claims that the Port LRC's delay in deciding their section 13 claims excuses their failure to exhaust the grievance procedures. In July 1985, the Coast LRC remanded Wasserman's section 13 grievance for further proceedings before the Port LRC. On October 3, 1985, the Port LRC considered his individual grievance. One month later, Wasserman filed suit in district court. See Carr v. Pacific Maritime Ass'n, No. CV 85-7243-FFF (C.D.Cal. Nov. 5, 1985).



Schreiner brought suit less than four months after filing his second complaint with the Port LRC. See Carr v. Pacific Maritime Ass'n, No. CV 85-7243-FFF (C.D.Cal. Nov. 5, 1985). Schreiner's and Wasserman's claims are based on what occurred after, rather than prior to, the commencement of this action. The district court was therefore correct in dismissing both Wasserman's and Schreiner's claims without prejudice and allowing them to pursue their contractual remedies.

AFFIRMED.

HALL, Circuit Judge, dissenting:

The federal courts have long followed a policy of giving great deference to private dispute resolution in labor relations. That policy is generally a sound one, but private resolution has its

limits. As the United States Supreme Court noted in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976), "Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." In the factual situation presented by this appeal, the private law system appears to have failed in its fundamental function of dispensing industrial justice. This case is thus an appropriate one for judicial intervention.

I.

Appellants have made quite a compelling and troubling showing that the 1984-85 registration process was tainted with nepotism and favoritism: perhaps 309

of the 410 successful longshore registrants (out of 22,250 total applicants) had either family or other close connections with union or PMA officials, or with union members. Allegations regarding the composition of the Port LRC that conducted the challenged registration process, and then decided appellants' and the individual grievances that followed, are even more troubling: several of the union and PMA representatives to that committee themselves had relatives among the successful applicants.

Appellants also persuasively argue that the informal grievance and arbitration procedures, conducted within an extremely constricted time frame and without provisions for any meaningful discovery, were wholly inadequate to the task of fairly adjudicating the individual or class



claims of nepotism and favoritism that arose out of the 1984-85 registration. Appellants' showing is sufficient to raise serious questions of bias in, and futility of, resort of the grievance and arbitration process.

It is generally true that employees must attempt to exhaust the grievance and arbitration procedures established in a collective bargaining agreement prior to bringing an enforcement action in district court under section 301 of the Labor Management Relations Act, 29 U.S.C. §185. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965); Vaca v. Sipes, 386 U.S. 171, 184-85 (1967); Berriault v. Local 40 Super Cargoes & Checkers of ILWU, 501 F.2d 258, 262 (9th Cir. 1974). This exhaustion requirement is, however, "subject to a number of exceptions for the variety of

situations in which doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor relations policy." Glover v. St. Louis-San Francisco Ry.Co., 393 U.S. 324, 329-30 (1969); Williams v. Pacific Maritime Ass'n., 617 F.2d 1325, 1328, n.13 (9th Cir. 1981), cert. denied, 449 U.S. 1101 (1981).¹

In Williams, 617 F.2d at 1328-29 n. 13, we noted that there are several situations in which an employee's failure to completely exhaust contractual remedies will be excused: (1) where the adjudicating body in the private law system lacks neutrality because it was chosen by the very defendants against whom the employee's

¹ Through this exception is a judge-made one, it should also be remembered that the exhaustion requirement itself is a judge-made requirement, not one mandated by section 301 or the collective bargaining agreement.

real complaint is made, Glover, 393 U.S. at 330-31; (2) where plaintiff's attempt to use the grievance process is not successful because the process is not "plain, speedy, and adequate," see, Maddox, 379 U.S. at 652-53; and (3) where the judicial relief requested is beyond the limited powers of the arbitrator to grant, Beriault, 501 F.2d at 266.

II.

Appellants' most compelling argument concerns the first exception, namely, that bias of the Port LRC makes the exhaustion of administrative procedures futile. Futility due to lack of neutrality can arise where the union and management are in collusion. Submission to administrative procedures "would entrust representation of the complaining employee to the very union he claims refused him fair



representation...." Lusk v. Eastern Products Corp., 427 F.2d 705, 708 (4th Cir. 1970) (plaintiffs alleged that the agreement bargained for between union and management deprived them of proper wages; lower court dismissed on theory that defendants were required to submit complaint to arbitration, appellate court would have reversed on that theory but affirmed on another theory). A grievance and arbitration procedure, "administered by the union, by the company, or both to pass on claims by the very employees whose rights they have been charged with neglecting and betraying," could not be trusted to remedy discrimination practiced by union and employer in concert. Glover, 393 U.S. at 330-331. See also, Battle v. Clark Equipment Co., 579 F.2d 1338, 1345-46 (7th Cir. 1978) overruled on other grounds,



679 F.2d 685 (7th Cir. 1982) (employees alleged that their signatures to a modification to the collective bargaining agreement were fraudulently obtained, court ruled that summary judgment could not be sustained on the ground that appellants failed to exhaust administrative remedies); Fulton Lodge No. 2 v. Nix, 415 F.2d 212 (5th Cir. 1969), cert. denied, 406 U.S. 946 (1972) (appellant, who had been fired, was not required to exhaust administrative remedies which dictated that he bring unfair practice charges before, first, the very person who fire him, and second, the board whose member he had accused of misconduct).

In the instant case, appellants present a plausible argument showing a similar type of futility due to collusion between union and management to engage in



nepotism and favoritism during the registration process. The registration process is conducted by the Port LRC, which is composed of representatives of the union and management. If appellants' allegations are true, both union and management members of the Port LRC panel that actually heard and rejected appellants' group grievance had close relatives who were successful registrants in the 1984-85 registration procedures.² Furthermore, the Port LRC not only controls the registration process, but also decides appeals regarding its own registration decisions. Any pursuit of the nepotism and favoritism claims through the

² For example, when the Port LRC met on October 16, 1985, to hear appellants' grievance, David Arian, President of Local #13, sat as committee chair; Charles Young was present to represent management. During the 84-85 registration, Arian's sister and Young's mother and girlfriend were registered.

Port LRC would require Arian and Young (and any other LRC members in a like situation³) to concede their own misconduct. As we stated in Williams, "[i]t is unlikely that such persons could be entirely fair and impartial. This lack of neutrality in the adjudicating bodies renders exhaustion of remedies futile." 671 F.2d at 1329, n.13.

A

Apparently, the majority recognizes that the Port LRC may have been biased in its review of the group registration

³ Other members of the Port LRC who reviewed the grievances and who also had relatives registered are as follows:

<u>Name</u>	<u>Affiliation</u>	<u>Relatives Registered</u>
D. Bark	ILWU #63	2 sons
H. Kazmark	ILWU #63	5 family members
A. Luera	ILWU #13	7 family members
J. McCoy	ILWU #13	1 family member
R. Ortega	ILWU #13	3 family members
G. Peyton	ILWU #63	2 family members



grievance. However, they decline to address the merits of the appellants' bias argument, denying the appellants' access to federal court solely because appellants' attempt to file a registration grievance was untimely, no matter how badly tainted with bias the grievance procedures may have been. I do not read our precedents as requiring such a harsh application of the exhaustion requirement.

The majority holds that appellants "waived" their right to claim bias on the part of the Port LRC by failing to raise the objection when the committee convened. The case on which they rely, Sheet Metal Workers International Association Local #420 v. Kinney Air Conditioning Co., 756 F.2d 742 (9th Cir. 1985), simply does not



compel such a conclusion.⁴ Kinney was an action brought in federal court by a union to enforce an arbitration award that was entered against an employer after an

⁴ Such a conclusion is also not mandated by the other three circuits which the majority claims have similar rules. Majority opinion at 5113. The cases cited all involve appellants who went through an arbitration process without objecting until they received an adverse ruling. Then they complained in federal court about bias situations which they knew of prior to proceeding with the arbitration. Such situations are different from the instant case where appellants claim that an attempt to file a grievance would have been fruitless. See Early; 699 F.2d at 558 (dismissed employee should have objected at hearing to seating of local union president when employee feared president would be biased due to employee's past participation in dissident union groups); Cook Industries, 449 F.2d at 107-8 (appellant cannot remain silent during arbitration when he knows that one of four arbitrators is employed by a competitor and then raise the issue when an adverse ruling is received); United Steel Workers, 648 F.2d at 913-14 (petitioner cannot wait until second remand to challenge the composition of the original hearing board that investigated his dismissal from his employment).

adjudication on the merits of the union's contract claim. The employer claimed the award should be vacated due to the partiality of the arbitration panel. We rejected Kinney's bias argument because the employer was a party to the agreement which established the arbitration procedure, because the panel members' financial interest in the outcome of the proceedings were known to Kinney before the hearing, and because Kinney failed to object to the selection of the panel members at the time they were seated. Id. at 746.

Kinney does not rule on when a party may be excused from exhausting the grievance procedure before filing in federal court. Rather, the petitioners in Kinney had exhausted the grievance procedure and were suing to vacate the arbitrator's award. The court was



unwilling to allow the petitioners, who had willing gone through the entire arbitration hearing without complaint of partiality, to make this argument for the first time in federal court, as a way of circumventing the arbitrator's adverse decision.

The instant case is distinguishable from Kinney in several important respects. First, appellants are not signatories to the applicable collective bargaining agreement. Unlike the employer in Kinney, they had no direct say in the establishment of procedures for selecting panelists who would hear and impartially decide their grievances, and for otherwise ensuring that longshore registrations were conducted in conformity with the substantive terms of the agreement. In further contract to Kinney, appellants never obtained a determination on the merits of their

contract claims. It cannot be said of appellants, as it could of the employer in Kinney, that they came to federal court seeking a redetermination of issues decided adversely to them in the private system of dispute resolution.

Furthermore, appellants in the instant case implicitly did raise their objection to having members of that body adjudicate their grievance. By alleging particular family connections between successful registrants and PMA and union officials, members, and employees, the appellants' objection to the Port LRC's lack of neutrality appeared on the face of the grievances. Thus, appellants have preserved their right to claim bias on the part of the Port LRC. Appellants' failure to timely file their grievance is explained by their belief that the Port LRC would not

have given them a fair hearing and their lack of pertinent information. The appellants knew that many of the Port LRC members were biased. In fact, there has been a long history of court actions against the Pacific Maritime Association and the ILWU on just these grounds.⁵

⁵ This is the twelfth time allegations of bias by the ILWU and the Pacific Maritime Association have come before this court. See Ritza v. ILWU, 837 F.2d 365 (9th Cir. 1988) (per curiam); Graybeal v. ILWU, No. 84-4061 (9th Cir. Apr. 22, 1985) (slip opinion); Scott v. Pacific Maritime Ass'n., 695 F.2d 1199 (9th Cir. 1983); Williams v. Pacific Maritime Ass'n., 617 F.2d 1321 (9th Cir. 1980); cert. denied, 449 U.S. 1101 (1981); Gibson v. Local 40, Supercargoes and Checkers, ILWU, 543 F.2d 1259 (9th Cir. 1976); NLRB v. ILWU, 514 F.2d 481 (9th Cir. 1975); Berlault v. Local 40, Supercargoes and Checkers, ILWU, 501 F.2d 258 (9th Cir. 1974); Griffin v. Pacific Maritime Ass'n., 478 F.2d 1118 (9th Cir. 1973) (per curiam), cert. denied, 414 U.S. 859 (1973); Pacific Maritime Ass'n. v. NLRB, 452 F.2d 8 (9th Cir. 1971); Local 13, ILWU v. Pacific Maritime Ass'n., 441 F.2d 1061 (9th Cir. 1971) cert. denied, 404 U.S. 1016 (1972); Alexander v. Pacific Maritime Ass'n., 434 F.2d 281 (9th Cir. 1970), cert.



Because the appellants were unaware of the identities of the particular Port LRC members who were to hear their cases, they were unable to collect evidence in a timely fashion. See section III of this dissent.

The majority's puzzling interpretation of Kinney seems to suggest that plaintiffs may be excused from the requirement that they file their registration grievances with the Port LRC because of that committees' bias against such claims, but that they would remain subject to a separate requirement that they present their bias "claim" in that forum before proceeding to federal court with a section 301 action. The majority's argument suggests that because the longshoremen

denied, 401 U.S. 1009 (1971); Williams v. Pacific Maritime Ass'n., 384 F.2d 935 (9th Cir. 1967), cert. denied, 390 U.S. 987 (1968).



failed to complete this latter step, they waived their right to object to the bias of the board. This interpretation would completely emasculate the bias/futility exception. If the longshoremen had filed a timely claim, they would not need the exception to the exhaustion requirement (for they would have successfully exhausted the grievance procedure). The underlying premise of the exception is that to force the plaintiffs to file with a biased board and go through their entire procedure is a waste of time and money, merely delaying their entry into federal court.⁶ We should

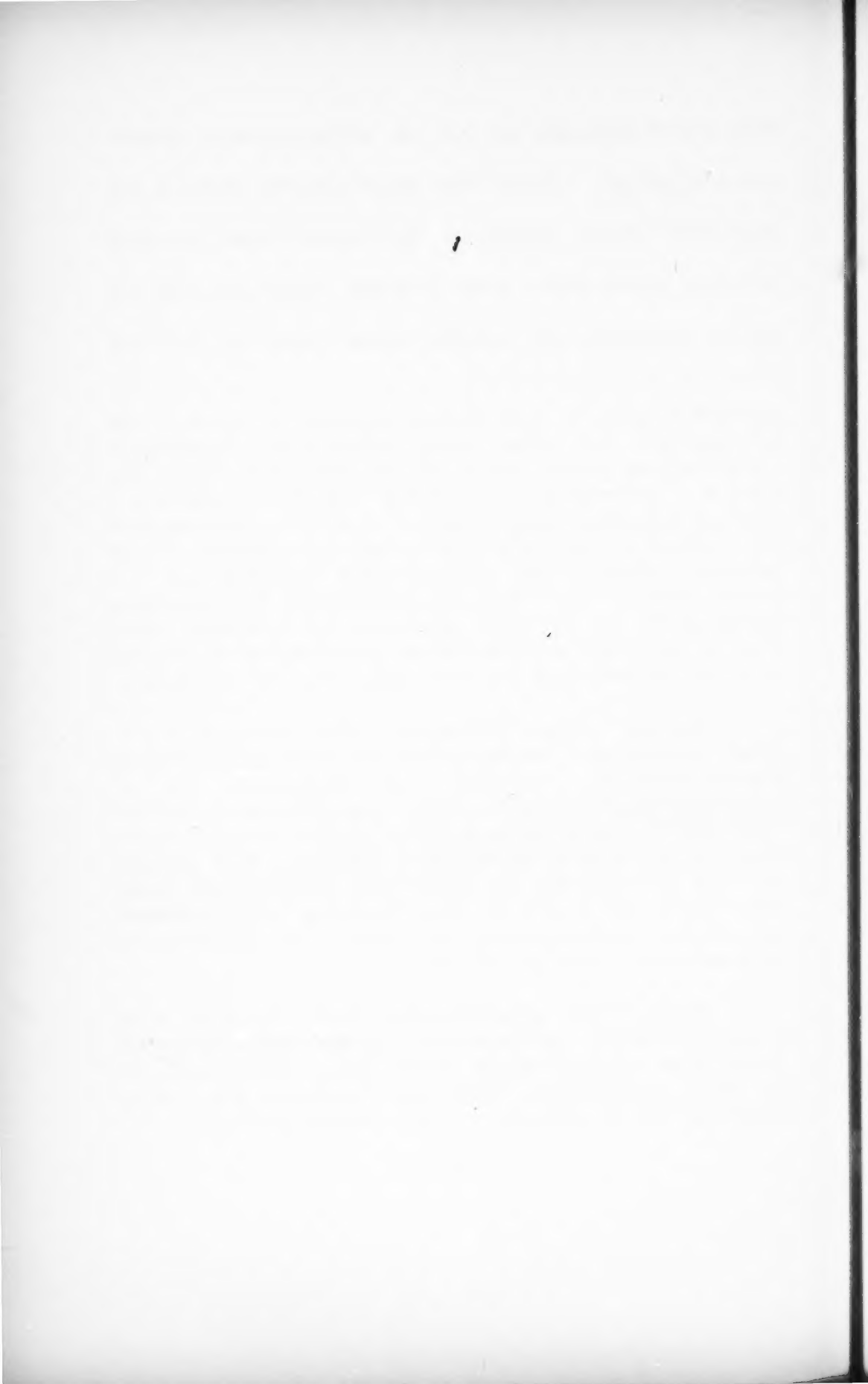
⁶ The attempt to exhaust contractual remedies made by petitioners in Glover consisted simply of informal complaints to the company regarding discrimination; they have utilized the grievance procedure by filing a formal complaint with the union or the company. In the instant case there have been at least as many complaints of bias against the Pacific Maritime Association and the International

not read Kinney so as to effectively over-rule Glover. Thus the appellants should be excused from failing to meet the 10-day filing deadline, and indeed from filing at all, because it would have been a futile

Longshoremen's and Warehousemen's Union, as evidenced by the long list of lawsuits (including this one) filed against them on this ground. See n.5, above. Additionally, appellants herein attempted to comply by filing their claims five months after the occurrence (there is no time limit in the collective bargaining agreement as to non-section 13 claims, and the Port LRC could have granted a 6-month filing extension on the section 13 claims).

Ritza also accepts the proposition that there are exceptions to the exhaustion requirement, making no mention of a requirement that the petitioner first "attempt" (but presumably fail) to utilize the grievance procedure. Rather, the point of the exception is that the plaintiff does not have to fulfill the Maddox requirement of first attempting to use the grievance procedure. 837 F.2d at 370.

Thus, if plaintiffs fit within the bias/futility exception, they are excused from the requirement that they seek relief in the grievance and arbitration process, whether in a timely or untimely fashion.



act to submit a nepotism grievance to a biased Port LRC panel on which both union and management representatives had engaged in the cronyism of which the appellants complained. It is unlikely that if appellants had filed their appeal within ten days, the LRC would have found that it was, indeed, selecting registrants unfairly.

B

I would require the district court to hold an evidentiary hearing (or at least consider affidavits submitted by the applicants⁷) on the issue of the potential bias of the Port LRC regarding plaintiffs' non-section 13 claims. In this manner,

⁷ In the instant case the judge made no factual finding as to whether the panel was actually biased, ruling instead that Kinney mandated dismissal on the grounds that petitioners waived their bias objection by not presenting it to the LRC.



only meritorious claims of futility of exhaustion due to bias will reach the federal courts. Thus I would remand this case for a judicial finding as to whether the bias of the Port LRC made filing a grievance with them futile. If the judge finds that this exception to the exhaustion requirement has been proven by the plaintiffs,⁸ I would allow them to file in federal court. If the plaintiffs fail to

⁸ Because I do not command a majority of this panel, I will not delineate the standard of proof that the plaintiffs would be required to satisfy. However, there are a number of options, including requiring the plaintiff to show a prima facie case of bias so as to get past summary judgment; having them prove bias by a preponderance of the evidence; or requiring them to show bias by clear and convincing proof. If they make only a prima facie showing, they will have to prove bias at trial. I believe an argument can be made for requiring clear and convincing proof in an evidentiary hearing before trial, in order to further the policy of private dispute resolution in the employment context, except where this machinery breaks down.

prove that the Port LRC was biased, the judge should then dismiss the complaint.

III

Appellants' second argument for why they should be excused from exhausting their contractual remedies is that the grievance process is inadequate. Unlike the bias/futility exception (see n.6, supra) this exception does, in the normal situation, require that appellants make some attempt to implement the procedures and find them inadequate. See Maddox, 379 U.S. at 653.⁹

A

It is undisputed that appellants attempted to follow contractual procedures

⁹ Maddox was decided prior to Glover. It is only logical that for the inadequate exception the petitioner must attempt to implement the procedures before finding them inadequate, while with the futility exception such an attempt would be useless.

for obtaining relief on their group grievance by filing before the discretionary six-month deadline for section 13 grievances. The majority summarily dismisses plaintiffs' attempt because their grievance wasn't filed within the 10-day filing period. It was highly unreasonable to expect individuals to muster, in ten days and without any discovery, proof of pervasive nepotism and favoritism sufficient to prepare a grievance stating a claim for violation of the collective bargaining agreement.¹⁰

¹⁰ Details of the identities of those registered was not known during the 10-day appeal period; identities of those individuals who would hear appeals was not known; thus the specific family connections could not be known during the 10-day period. The information regarding family connections of those registered was not easily obtained because the Port LRC has never published, or made available to anyone other than union or PMA officials, a list of applicants who were registered



Instead, appellants diligently pursued such proof through the informal channels of discovery before filing their "group grievance" in October 1985, well within the six-month period allowable at the discretion of the Port LRC.¹¹ Given the

during the 1984-85 registration process. Appellants gathered information by interviewing a substantial number of people over a long period of time.

Of course, the collective bargaining agreement neither required nor forbade appellants' investigation. However, the fact that they felt the need to conduct an independent investigation indicates that, although they knew that grievances were supposed to be filed within the 10-day period, they believed it would have been futile to proceed before a biased panel of the Port LRC without rock-solid and compelling proof of a violation of the collective bargaining agreement.

¹¹ It is important to note that there is no time limit stated in the collective bargaining agreement for filing non-section 13 grievances.

The Coast LRC, apparently with the consent of union representatives, established the ten-day period for

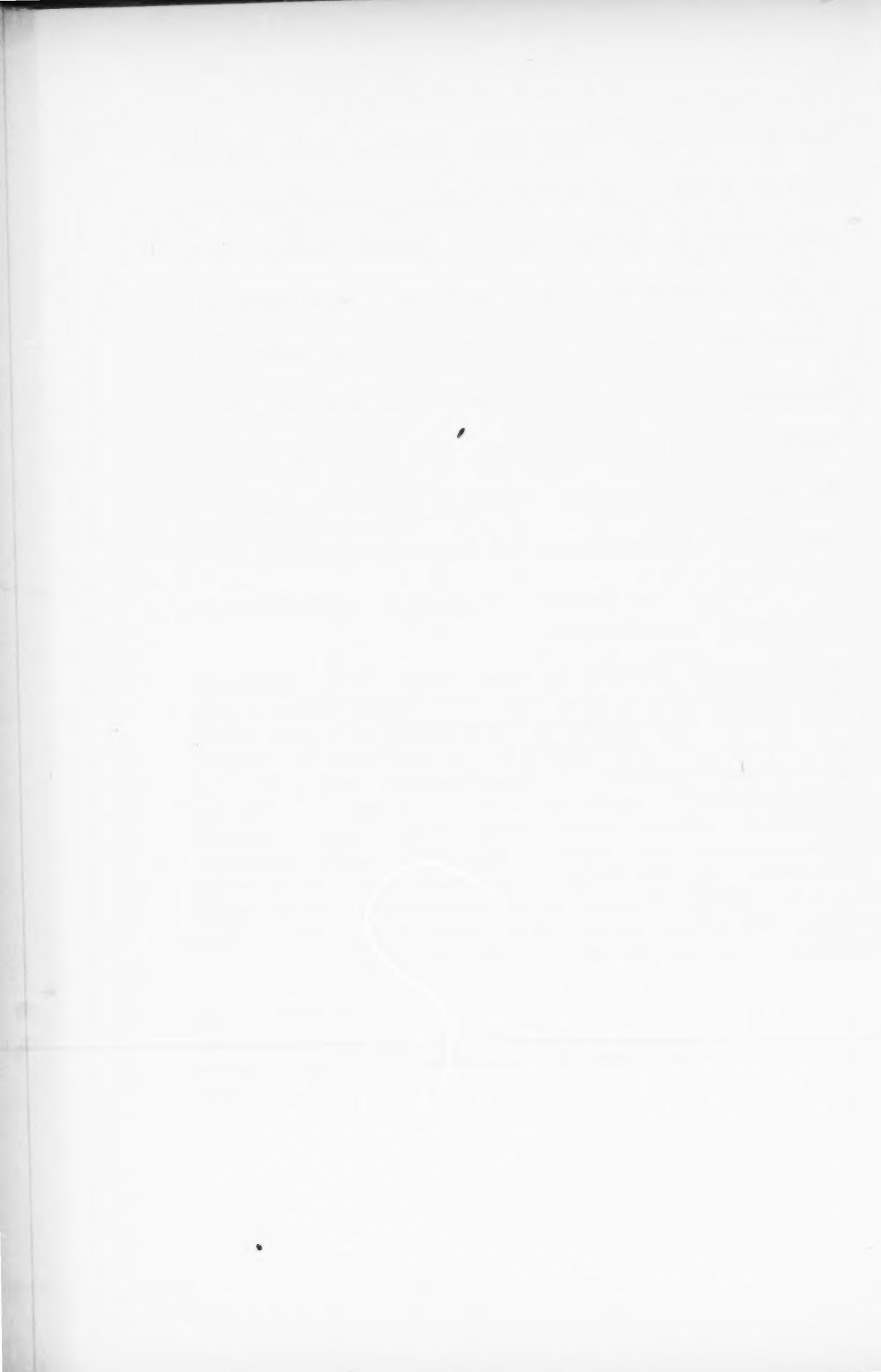


potentially hostile forum to which appellants were initially required to present their proof, I would hold that their attempt to pursue contractual remedies was sufficient to satisfy the Maddox requirement that grievants must generally attempt to use the administrative grievance process before asking for a judicial declaration of its inadequacy.¹²

The majority treats appellants'

grievances arising out of the 1984-85 registration. It may not have been, and the Coast Arbitrator concluded it was not, an abuse of discretion to refuse to apply the six-month limitations period to appellants' section 13 claims. Note, however that that was the only issue presented to the neutral arbitrator. Whether appellants' non-section 13 claims were timely filed is a separate issue that was decided only by the Port LRC and (implicitly) by the district court.

¹² The plaintiff in maddox made no attempt to use the 3-step administrative grievance procedure to recover severance pay. Instead, three years later, he filed an action in federal court.



unsuccessful attempt as if it were equal to no attempt and states that appellants are barred from federal court because "grievants must present and prosecute their grievances through contractual procedures before complaining of the inadequacy of those processes" and appellants have not completed such processes. (Majority opinion at page 5115-16). They rely on Hines, 424 U.S. at 563, and Berriault, 501 F.2d at 262, to support their assertion. I do not read these two cases to preclude an exception in the instant case.

The Hines case contains absolutely no discussion of what the "attempt" must consist of, as the appellant in Hines had fully exhausted the grievance procedure, and obtained an adverse administrative decision. The court allowed the federal suit, despite a final arbitration decision



on the merits, because the grievance procedure and arbitration had been inadequate. This inadequacy stemmed from the union's failure to even minimally investigate the theft charges against the appellee, which later information revealed to be false. The court held that "[a]s is the case where there has been a failure to exhaust, however, we cannot believe that Congress intended to foreclose the employee from his §301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct." Hines, 424 U.S. at



Likewise in Beriault the Court again noted the general rule that employees must attempt to exhaust the grievance arbitration procedure, but goes on to note that "[u]nder certain circumstances, however, an employee may obtain judicial review of his breach-of-contract claim despite his failure to pursue contractual remedies." Beriault, 501 F.2d at 262. In Beriault the plaintiffs made no real effort to prosecute their grievance. Id. These plaintiffs failed to present any evidence to support their grievance at a hearing

13 In Hines there was no conspiracy between the union and the employer. The employer honestly believed the employee was stealing, the union just failed to adequately investigate the charges. There was no bias on the part of the arbitration hearing committee, thus the futility/bias exception was not applicable. Yet the court allowed petitioner to file in district court under section 301.



before the Joint Port Labor Relations Committee. Plaintiffs were invited to return and present additional evidence at a later time, but again failed to do so. Plaintiffs' actions in Berriault, thus, cannot be said to be in any way similar to the appellants' actions in the case at bar. The appellants in the instant case made every reasonable attempt to gather and present evidence of bias, but the Port LRC refused to hear it. Further, the Port LRC had discretion to allow plaintiffs' grievances to be filed for a period of up to six months. Considering the difficulty of obtaining evidence, plaintiffs' good faith effort to file their grievance should have been allowed.

B

Furthermore, unlike the majority, I would not reject the appellants' argument



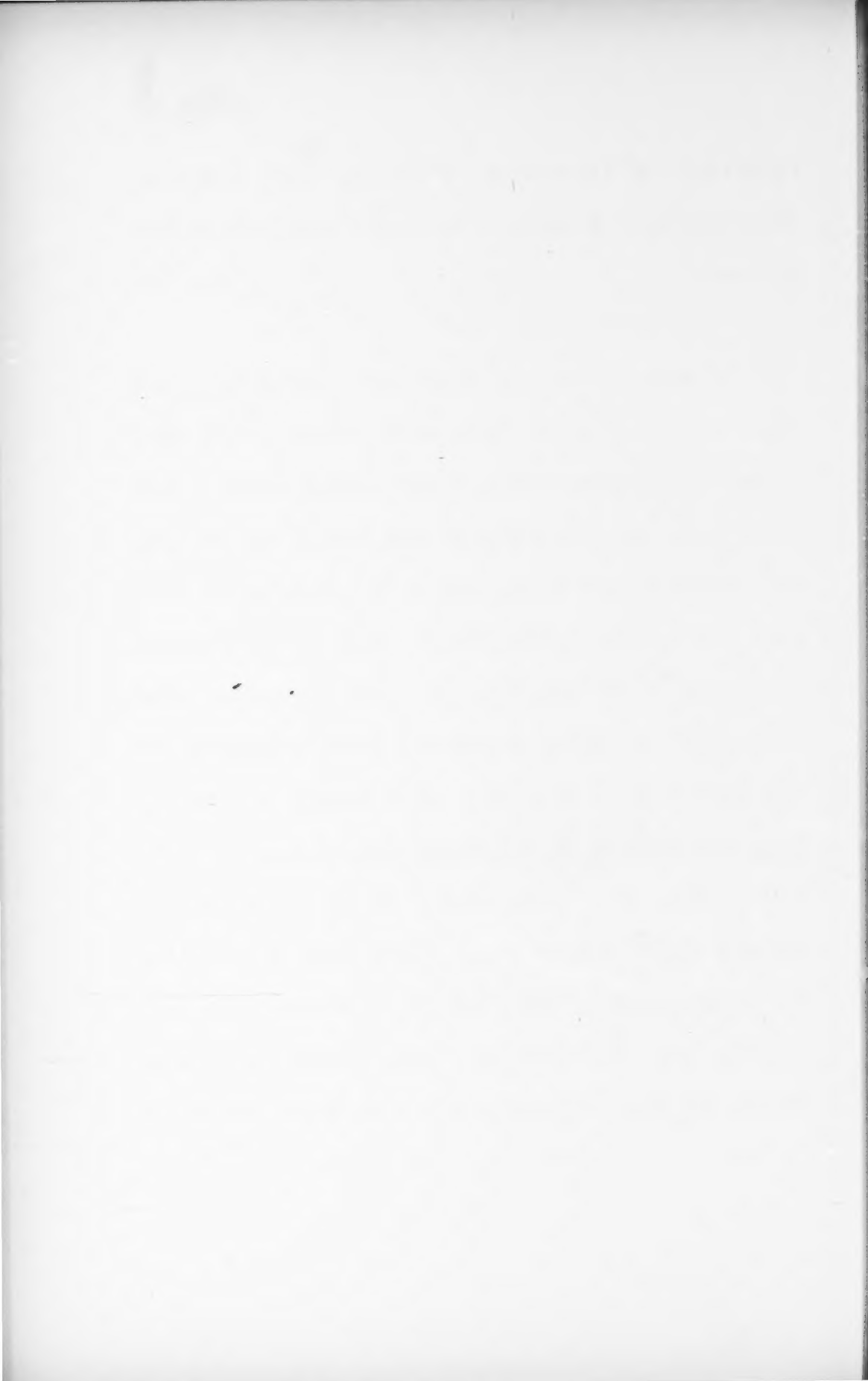
that their failure to exhaust administrative remedies should be excused because the grievance procedures are subject to unreasonable delays. As far as we can tell, at the time this appeal was filed, those members of the appellant classes who timely filed individual grievances alleging favoritism and nepotism were still awaiting a decision by the Port LRC. Certainly the majority would not expect appellants to sit on their contract rights until an "unreasonable" period of time had elapsed, and risk running afoul of the statute of limitations for a court action. I would accept the appellants' argument about unreasonable delays in the private law system at least insofar as it illuminates the fundamental procedural inadequacy of the grievance and arbitration procedure to deal with a large class of



related grievances arising out of an allegedly discriminatory registration process.

IV

The majority further believes that even if the Port LRC was biased, or the grievance procedures were inadequate, any such bias or inadequacy was cured by having an independent arbitrator available at the end of the grievance and arbitration process. I recognize and concede the validity of this argument with respect to the section 13 claims. See Ritza v. Int'l. Longshoremen's & Warehousemen's Union, 837 F.2d 365, 370 (9th Cir. 1988). However, independent arbitration was not available to appellants for their non-section 13 claims of favoritism (nepotism) and bad faith in the registration and employment of



longshore workers and clerks.¹⁴ Thus these claims are not barred by the Ritza analysis.

V

Appellants' showing, with respect to both the registration process and the procedures for guaranteeing that registration is conducted in accordance with the terms of the collective bargaining agreement, is sufficiently troubling as to indicate that this is, regrettably, one of those are cases in which the private law system has broken down. It would have been a futile act to submit a timely grievance based only on rumors and speculations for investigation and decision to a biased Port

¹⁴ Independent arbitration is available only for section 13 claims, by appeal from the Port LRC to the Coast LRC, and then to the Coast Arbitrator. In the case of non-section 13 grievances, the Port LRC is the sole and final arbiter.



LRC panel on which both union and management representatives had what appears to be a serious conflict of interest. The private machinery for dispensing industrial justice appears to have broken down in this case. If appellants can prove bias, I would excuse them from exhausting the contractual grievance procedures, and allow them to proceed with their proof on the merits of their group grievance. Thus I would REVERSE AND REMAND.



FILED
JUN 3, 1987

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN CARR, et al.,	) Case No.
	) CV 85-7243 FFF
Plaintiffs,)
	) STATEMENT OF
v.	) UNCONTROVERTED
	) FACTS AND
PACIFIC MARITIME ASSN.,	) CONCLUSIONS OF
et al.,	) LAW
)
Defendants.)
)

The motions of defendants Pacific Maritime Association ("PMA"), International Longshoremen's and Warehousemen's Union ("ILWU"), and International Longshoremen's and Warehousemen's Union Locals 13 and 63, for summary judgment were heard by this Court on April 20, 1987. The Court, having considered the evidence, determines the following facts to be uncontroverted and makes the following conclusions of law.



UNCONTROVERTED FACTS

1. PMA is a multi-employer association that handles labor relations matters for employers in the shipping industry in ports along the pacific coast. ILWU and its Local 13 and 63 represent the longshoremen, clerks, and foremen who comprise the affected bargaining unit in this industry.

2. PMA and ILWU operate dispatch halls in each port area from which longshore labor is dispatched to various waterfront locations. From time to time, PMA and ILWU agree to register or deregister laborers. Only registered longshoremen are eligible for dispatch from these halls.

3. In August 1984, the Joint Coast Labor Relations Committee ("Joint Coast LRC") which is composed of employer and



labor union representatives, authorized the registration of 300 additional Class B longshoremen and 50 additional Class B marine clerks for the Los Angeles/Long Beach area. Approximately 30,000 applications were distributed to interested persons. By September 26, 1984, approximately 22,250 completed applications were returned.

4. The plaintiffs, 109 unsuccessful applicants for registration, contend that the registration process was tainted by favoritism, nepotism, cronyism, coaching of certain applicants and improper scoring of certain applications. It is uncontroverted that the allegations of improprieties were common knowledge among members of the casual longshore work force. Most of the plaintiffs worked as casual longshoremen and clerks.



5. By April 9, 1985 the registration committee completed the registration of 50 clerks and 250 longshoremen. The committee agreed to proceed with the registration of 87 additional longshoremen. The additional registrations were completed by May 4, 1985.

6. The union and employer members of the registration committee could not agree on the mechanics of an appeal procedure for unsuccessful registration applicants. The disagreement was referred to the Joint Coast LRC. On April 26, 1985, the Joint Coast LRC instructed the registration committee to post notice when the current phase of registration had been completed. The Joint Coast LRC further instructed that grievances concerning that phase of registration must be filed within



ten days of the posting of such notice.

7. On May 6, 1985, the registration committee posted notice of the termination of the initial phase of the registration process at various locations including the offices of the PMA, the ILWU Local 13 longshore dispatch hall, the ILWU Local 63 dispatch hall, and the casual dispatch hall located at Berth 179, Wilmington, California. The notice advised that appeals or grievances filed after May 15, 1985 would be considered untimely.

8. Several of the plaintiffs saw the posted notice. The notice was also widely discussed.

9. In response to the notice, approximately 318 appeals were filed by unsuccessful applicants. Of these, 30 were subsequently registered.

10. On October 16, 1986, plaintiffs

filed a formal group grievance with the Los Angeles-Long Beach Port LRC. The grievance complained of arbitrary testing, selections for registration based on family connections, and selective disclosure of information to aid certain applicants.

11. The employment of longshore workers is governed by a collective bargaining agreement, the Pacific Coast Longshoremen's and Clerk's Agreement ("PCLCA"). The plaintiffs' grievance alleged the registration process violated various provisions of PCLCA that call for good faith in the registration process, promotion from the ranks, promotion based on merit, and provisions that forbid favoritism and discrimination.

12. The instant action was filed November 5, 1985.

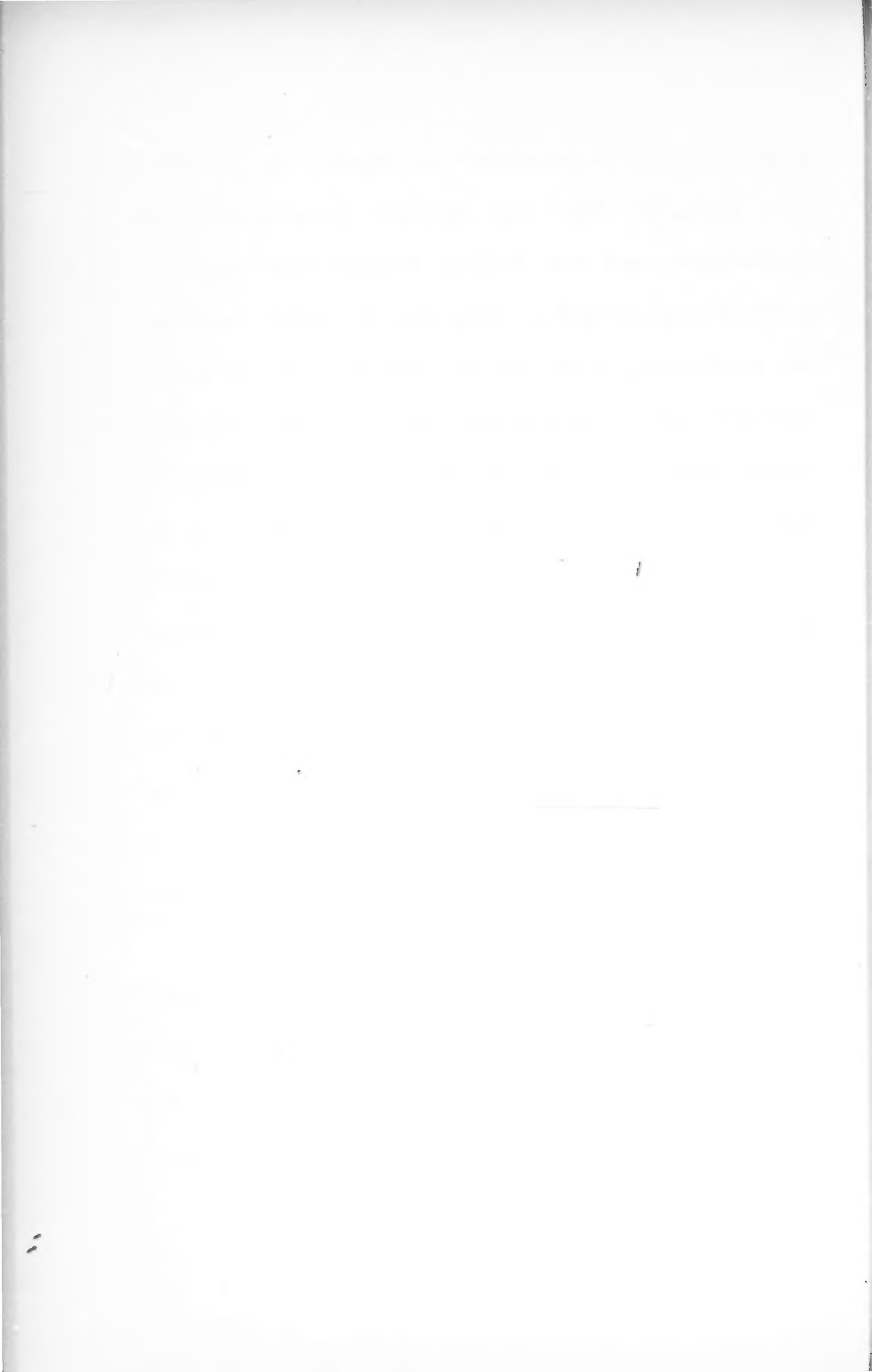
13. The Joint Port LRC denied



plaintiffs' grievance on April 11, 1986. The grounds for the denial were that the grievance was not filed within the ten-day period specified in the May 6, 1985 notice. In addition, the denial was based on PCLCA §17.41, which provides that one may file a claim for discrimination within ten days of the occurrence of the discrimination.

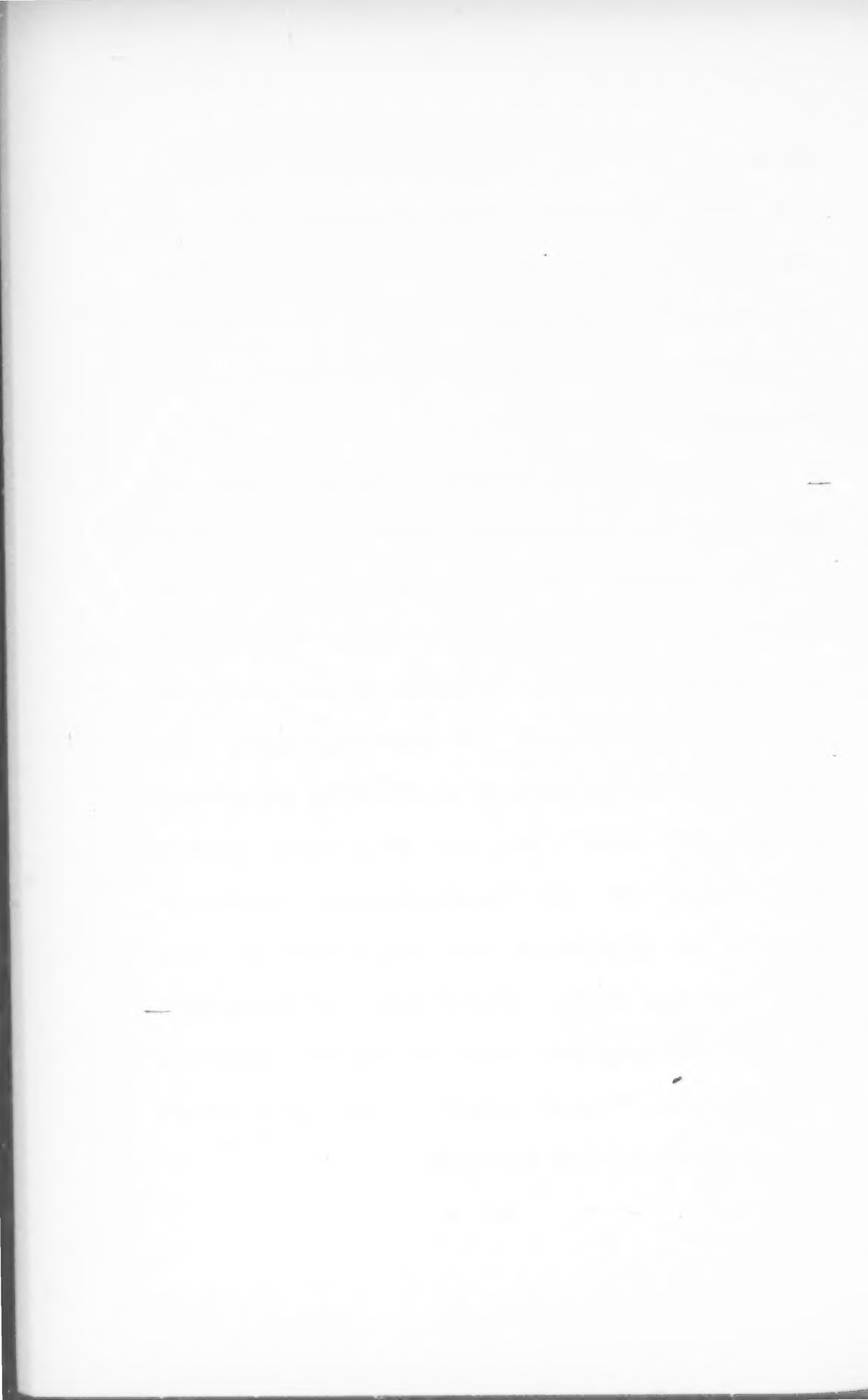
14. Plaintiffs appealed their grievance to the Joint Coast LRC which upheld the Port LRC's decision. They then appealed the discrimination claims to the Coast Arbitrator, Sam Kagel. There is no evidence that plaintiffs ever objected to the lack of neutrality of either LRC or the arbitrator.

15. On January 15, 1987, Kagel issued his decision denying plaintiffs' claims on the grounds of untimeliness. He found that grievants knew or should have



known of the May 15, 1985 appeal deadline and the alleged improprieties in the registration process. He also rejected plaintiffs' argument that the appeal limitations periods should have been extended.

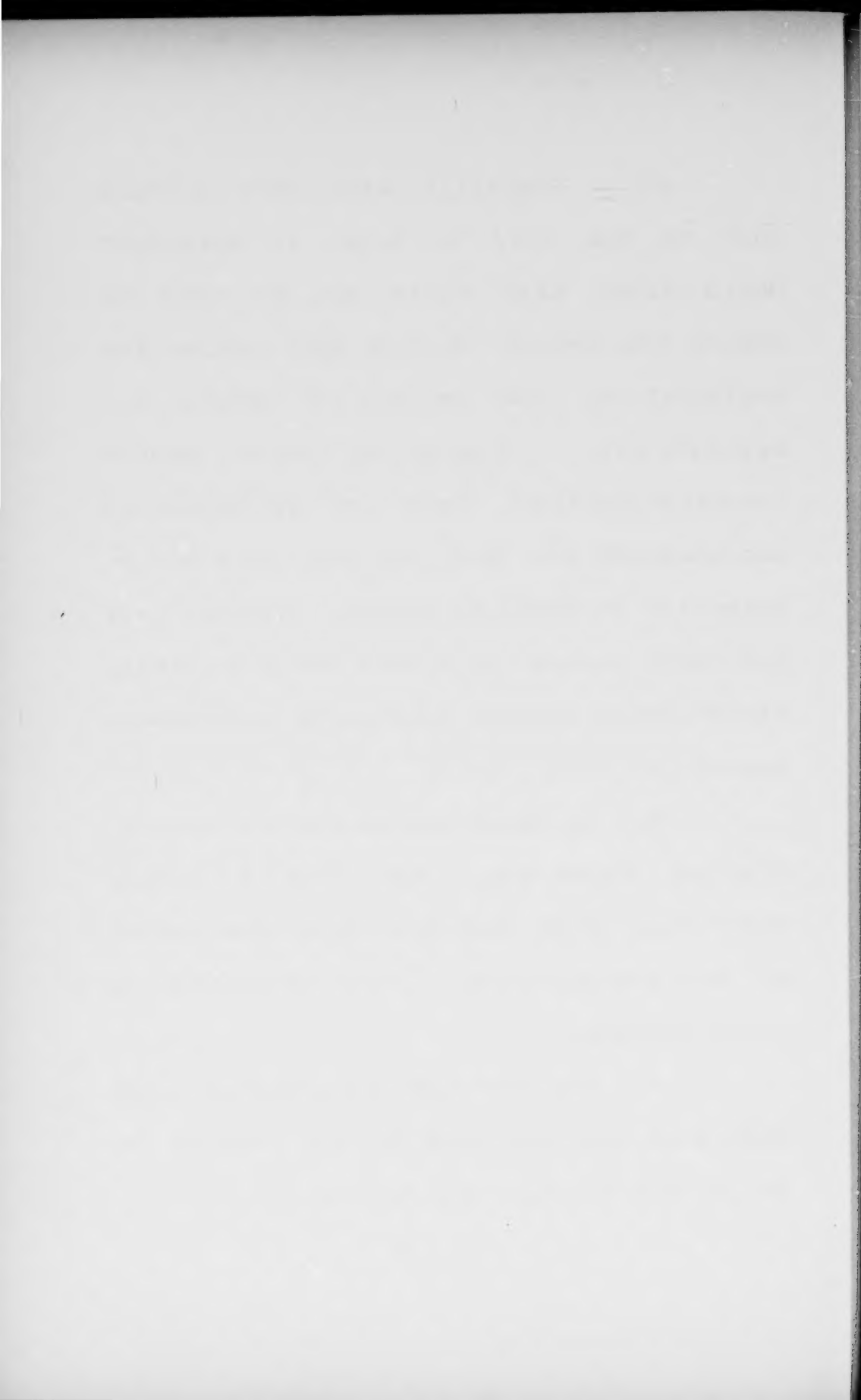
16. The PCLCA states that it provides the exclusive remedy for disputes arising between employees and the PMA. In addition, the Joint Coast LRC's Memorandum of Coastwise Rules Covering Registration and Deregistration of Longshoremen and Clerks provides that the PCLCA's grievance procedures shall be the exclusive remedy with respect to registration disputes between an applicant for registration, the PMA, and the ILWU. The PCLCA and Coastwise Rules also provide that no other remedies may be utilized until the grievance procedure has been exhausted.



17. Plaintiff John Carr alleges that he was told by Local 13 President David Arian that there was no need to appeal the denial of this application for registration, but rather to update his application. Plaintiff Jesse Gann's "understanding" from a loudspeaker announcement was that one must have had an interview in order to appeal. Neither Carr nor Gann denies knowledge of the widely disseminated notices explaining the appeals procedure.

18. At least one of the plaintiffs, Stanley Wasserman, did file a timely individual grievance regarding the denial of his registration. That grievance is still pending.

19. Any statement of uncontroverted fact that are included in the conclusions of law are incorporated herein.



CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

2. Exhaustion of contract grievance procedures is a prerequisite to a Section 301 action. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Failure to invoke a timely grievance constitutes a failure to exhaust the grievance procedures. See, Stephens v. Postmaster General, 623 F.2d 594, 595 (9th Cir. 1980).

3. When a collective bargaining agreement calls for final and binding arbitration, the arbitrator's decision is ordinarily final, see United Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599, 80 S.Ct. 1358, 1362 (1960),

including the arbitrator's decision regarding the timeliness of the grievance. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909 (1964).

4. The Coast Arbitrator's decision concerning plaintiff's claims of discrimination is final and binding. No extraordinary circumstances are present that would justify overturning that decision.

5. The remainder of plaintiffs' group claims are similarly barred due to the failure to file them by May 15, 1985. In that regard, the decisions of joint employer grievance committees are binding. See Donley v. Motor Freight Express, 344 F.Supp. 290 (W.D. Penn. 1972), aff'd, 481 F.2d 1398 (3d Cir. 1973).

6. This Court cannot accept plaintiffs' argument that they attempted to

exhaust their administrative remedies once they had sufficient evidence with which to do so. Arbitrator Kagel's finding that plaintiffs were in a position to file their claims of discrimination prior to May 15, 1985 was supported by the record and applies with equal force to all of plaintiffs' claims.

7. The Court also rejects plaintiffs' attempt to excuse their failure to exhaust administrative remedies on the grounds that defendants repudiated the PCLCA's procedures or that the procedures were somehow inadequate. Plaintiffs offered only speculative argument in this regard.

8. Similarly untenable is plaintiffs' contention that exhaustion was futile because the Joint Port LRC was biased against them. Plaintiffs failure to

challenge the composition of the Committee when they submitted their grievance to it effects a waiver of the bias objection. Cf. Sheet Metal Workers Int'l Ass'n v. Kinney Air Cond., 756 F.2d 742 (9th cir. 1985).

9. In addition, the Court finds no basis for excusing the untimeliness of plaintiffs' claims on the grounds that the union defendants breached their duty of fair representation. This is not a case in which the unions are alleged to have breached their duty in negotiating a collective bargaining agreement, see Williams v. Pacific Maritime Ass'n., 617 F.2d 1321 (9th cir. 1980), or in which the plaintiffs were prevented from exhausting contractual remedies by the unions' wrongful refusal to process a grievance. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct.

903 (1967).

10. The testimony of plaintiffs Carr and Gann that they relied on erroneous advice and understandings concerning the appeal process does not raise a material issue of fact barring summary judgment. Under the circumstances, it was not reasonable to disregard the information contained in the notice of termination of the initial phase of the registration process. Cf. Stephens v. Postmaster General, 623 F.2d, 594, 595 (9th Cir. 1980).

11. Defendants' motions for summary judgment are hereby GRANTED. Nothing herein is intended to prevent the plaintiffs from proceeding with any grievances that were timely filed.

12. All statements of undisputed facts that are deemed to be conclusions of

law are so found.

13. The Court incorporates its comments from the bench on April 20, 1987 as further explanation for its determinations.

DATED: June 2, 1987

FERDINAND F. FERNANDEZ
U.S. DISTRICT JUDGE

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

FILED
JUN 3, 1987

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

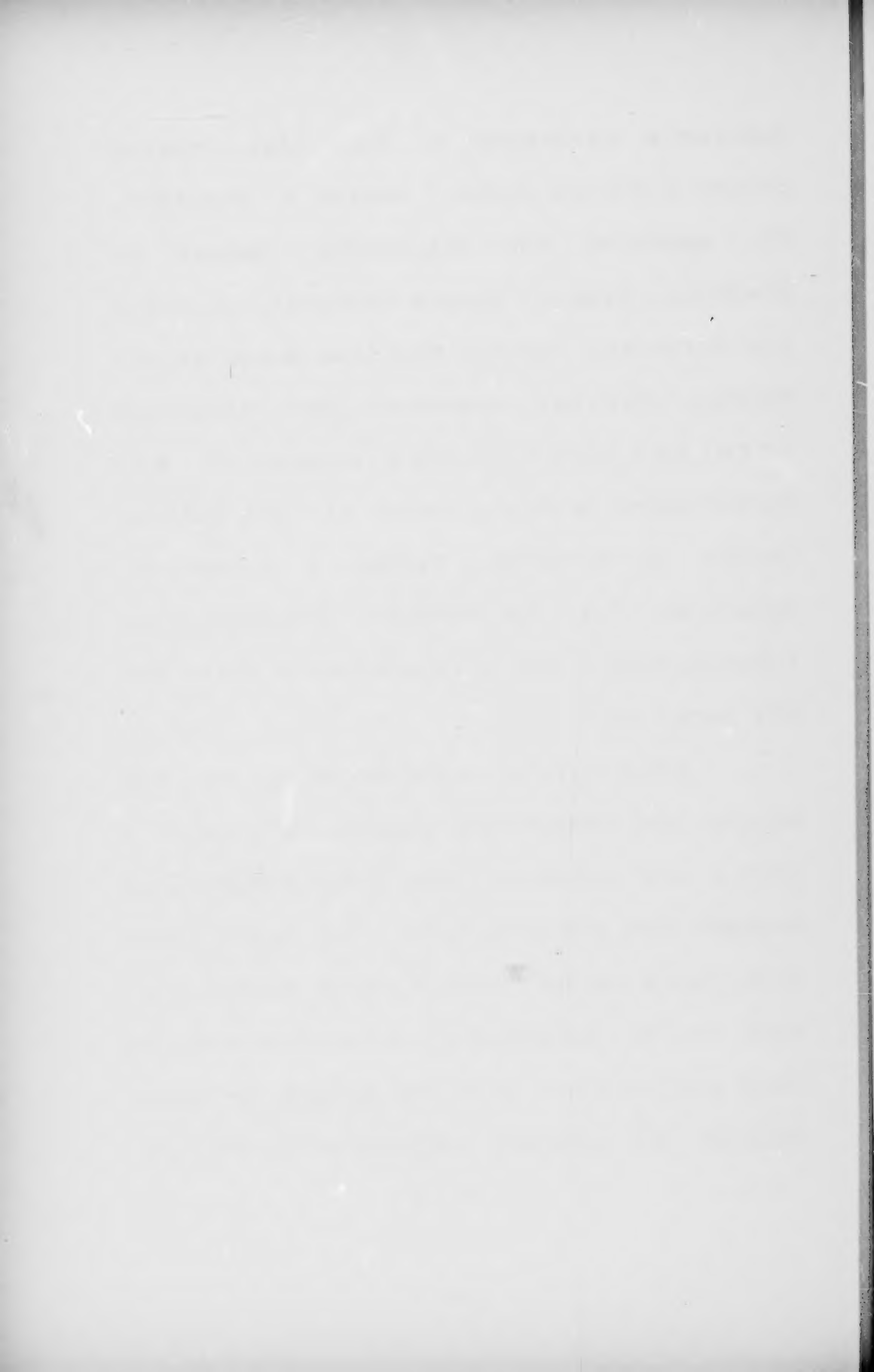
JOHN CARR, et al.,	)	Case No.
	)	CV 85-7243-FFF
Plaintiffs,)	
	)	SUMMARY JUDGMENT
v.)	
)	
PACIFIC MARITIME ASSN.,)	
et al.,)	
)	
Defendants.)	
<hr/>		

The motions of defendants Pacific Maritime Association International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union Locals 13 and 63 for summary judgment under Rule 56 of the Federal Rules of Civil Procedure were heard in the United States District Court for the Central District of California before the



Honorable Ferdinand F. Fernandez, United States District Judge. George W. Shaeffer, Jr. appeared for plaintiffs; Dennis A. Gladwell, Gibson, Dunn & Crutcher, appeared for defendant Pacific Maritime Association; George Shibley appeared for defendant International Longshoremen's and Warehousemen's Union Local 13; and William Carder of Leonard, Carder & Zuckerman, appeared for defendants International Longshoremen's and Warehousemen's Union and its Local 63.

After full consideration of the moving and responding papers, all support papers and exhibits, and oral argument of counsel and the plaintiff, the Court finds that there is no triable issue of material fact as to defendants' formative defense that plaintiffs' suit is barred by their failure to exhaust contractual remedies.



Therefore, defendants are entitled to summary judgment in this case.

In accordance with the Statement of Uncontroverted Facts and Conclusions of Law filed herein,

IT IS SO ORDERED AND ADJUDGED:

1. That plaintiffs' allegations concerning Section 13 of the collective bargaining agreement between the ILWU and Pacific Maritime Association are barred by their failure to exhaust administrative remedies.

2. That plaintiffs' claims under other provisions of the collective bargaining agreement are barred by plaintiffs' failure to exhaust contractual remedies.

3. That defendants are entitled to summary judgment, and this case shall be dismissed with prejudice, provided,

The first of these is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference. This is
 due to the fact that the government
 has been unable to secure the necessary
 funds to carry out its policy of non-
 interference. This is due to the fact
 that the government has been unable
 to secure the necessary funds to carry
 out its policy of non-interference.

however, that nothing in this judgment is intended to prevent the plaintiffs from proceeding with grievances which were timely filed pursuant to the applicable agreements and notices.

Dated: June 3, 1987

Ferdinand F. Fernandez
U.S. District Judge

A0306.APP



The Petitioners before this Court are:

John Carr, Arron Alexander, Mike Andrews, Elie Anthony, Anna Ashbrook, Raymond G. Ayala, Patsy Badderley, David Balsley, Don Bean, Ken Bennett, James Biller, William Blackwood, Jim Bockrath, Conrad Bojorquez, Don Brickey, Dennis Brueckner, John Bryant, Glen Buchanan, Jon J. Buchanan, John Burtsch, Keath Butner, Paul Butner, Isadore Califano, Pat Califano, Joe Camello, Richard Campos, Jim Carbone, Jennifer Chambers, Gary Coad, Russ Coates, Kay Collins, James Cuff, Antonio DeIorio, Richard DePippo, Tim DeSantis, Miodrag Dimitrijevic, James W. Duff, Vince Ferrara, Linda Galaz, Jess Gann, Robert C. Gonzales, Ruben A. Gonzales, Jr., Charles Greisjraber, Michael J. Gutierrez, D. Roy Haggerty, Judy Haggerty, Patty Hamlin, Bill Haney, Charles Hecht, Raymond Jones, John Kalina, Henry Keliihoomalu, Vince Lauro, Frank Lipanovich, John Madrigal, Savetta Mann, George Martin, William Martin, Vince Mattera, Madison D. May, Jack McConnachie, Sr., Bill McFarland, David McKelvey, Rudy Melgosa, Jenny Milburn, Ron Miller, Bert M.D. Minter, George Mitchell, Sam Morreale, Ty Neal, Ramon Ochart, Cheryl Y. Olivas, Jim Pandora, Bill Pearia, Dee Pollock, Maria Radakovic, Dennis Regan, Jerry Rios, Rich Risso, Jr., Roy Risso, David Rivera, Richard Rivera, Harry Roberts, Frank Rodriguez, Raul Rodriguez, Raul Rojas, Reginald Roland, Diana Rosas, George Roybal, Jeff Schaap, Joe Schaffer, Jr., Steve Schaffer, Neal Schreiner, Jim Seixas, Joe Simon, David Singh, Gary B. Taylor,

Astrid B. Thangen, Steve Torres, Gary Trujillo, John Tuck, Ralph Tupaz, Jim Vickers, Stanley Wasserman, B.J. White, Peter Camez, William R. Cannady, Phil Menzes, Judy Checkers, Patricia Potter, Ed Harris, Jose Miranda, Augustine Onorato, Frank Onorato, Linda Onorato, Gabino Pedroza, Greg Brooks, Robert Campbell, Ron Chamberlin, Ben Lopez, Frank Mattera, Bertrand Miller, Armand Montano, Tom Utley, Ronald Booher, John Carlisle, and Kevin Juergensen.

**RELEVANT SECTIONS OF THE
APPLICABLE COLLECTIVE BARGAINING
AGREEMENT DISCUSSED IN THE PETITION**

§8.31 provides in relevant part:
"The Joint Port Labor Relations Committee in any port, subject to the ultimate control of the Joint Coast Labor Relations Committee, shall exercise control over registered lists in that port, including the power to make additions to or subtractions from the registered lists as may be necessary...."

§8.43 provides: "Their shall be no favoritism or discrimination in the hiring or dispatching or employment of any longshoremen qualified and eligible under the agreement."

§8.44 provides: "Any longshoremen or dispatching hall employee found guilty by the Joint Port Labor Relations Committee of favoritism or discrimination or bribery shall immediately be discharged and dropped from the registered list."

§9.1 provides: "The principle of promotion from the ranks is hereby recognized and agreed to. For the purpose of this Contract Document, promotion is defined as upgrading registered longshoremen covered by this Contract Document and the classifications contained in the respective Port Supplements."

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

The first settlement of the city of Boston was made in the year 1630, by a company of Puritan settlers, who came from England, and were led by John Winthrop. They founded the city on the site of the present city, and named it Boston, in honor of the Earl of Boston, who had been one of the first to settle in the colony. The city grew rapidly, and by the year 1680 it had become one of the most important cities in the colony. It was the seat of the colonial government, and the center of the trade of the colony. It was also the seat of the university, and the center of the intellectual life of the colony. The city was the first to be incorporated as a city, and it was the first to have a mayor and a city council. It was the first to have a public library, and the first to have a public school. It was the first to have a public hospital, and the first to have a public workhouse. It was the first to have a public prison, and the first to have a public almshouse. It was the first to have a public market, and the first to have a public fair. It was the first to have a public theater, and the first to have a public opera house. It was the first to have a public museum, and the first to have a public observatory. It was the first to have a public library, and the first to have a public school. It was the first to have a public hospital, and the first to have a public workhouse. It was the first to have a public prison, and the first to have a public almshouse. It was the first to have a public market, and the first to have a public fair. It was the first to have a public theater, and the first to have a public opera house. It was the first to have a public museum, and the first to have a public observatory.

The city of Boston was the first to be incorporated as a city, and it was the first to have a mayor and a city council. It was the first to have a public library, and the first to have a public school. It was the first to have a public hospital, and the first to have a public workhouse. It was the first to have a public prison, and the first to have a public almshouse. It was the first to have a public market, and the first to have a public fair. It was the first to have a public theater, and the first to have a public opera house. It was the first to have a public museum, and the first to have a public observatory.

The city of Boston was the first to be incorporated as a city, and it was the first to have a mayor and a city council. It was the first to have a public library, and the first to have a public school. It was the first to have a public hospital, and the first to have a public workhouse. It was the first to have a public prison, and the first to have a public almshouse. It was the first to have a public market, and the first to have a public fair. It was the first to have a public theater, and the first to have a public opera house. It was the first to have a public museum, and the first to have a public observatory.

The city of Boston was the first to be incorporated as a city, and it was the first to have a mayor and a city council. It was the first to have a public library, and the first to have a public school. It was the first to have a public hospital, and the first to have a public workhouse. It was the first to have a public prison, and the first to have a public almshouse. It was the first to have a public market, and the first to have a public fair. It was the first to have a public theater, and the first to have a public opera house. It was the first to have a public museum, and the first to have a public observatory.

§9.2 provides in relevant part: "There shall be established in each port a joint committee of registered longshoremen and of employers. It shall be the duty of such committee to establish qualifications for promotions to classifications covered by this Contract Document, including trainees, and to pass on all such promotions. The promotions committee shall determine the trainees under policies laid down by the Joint Port Labor Relations Committee. Such qualifications shall include length of service in the industry, competency and ability to perform skilled operations...."

§18.1 provides: "As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks of subterfuge. The Employers give the same guarantee of good faith observance on their part."

§13 provides: "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or non-membership in the Union, activity for or against the Union or absence thereof, or race, creed, color, sex, age, national origin or religious or political beliefs."

§17.23 provides: "If the grievance is not settled as provided in 17.21 or 17.22 or does not arise on the job, it



shall be referred to the Joint Port Labor Relations Committee which shall have the power and duty to investigate and adjudicate it.

§17.24 provides: "In the event that the Employer and Union members of any Joint Port Labor Relations Committee shall fail to agree upon any question before it, such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision.

§17.4 provides: "When any longshoremen (whether a registered longshoremen or an applicant for registration or a casual longshoreman) claims that he has been discriminated against in violation of Section 13 of this Agreement, he may at his option and expense, or either the Union or the Association may at its option and at their joint expense, have such complaint adjudicated hereunder, which procedure shall be the exclusive remedy for any such discrimination."

§17.41 provides: "Such remedy shall be begun by the filing of the grievance with the Joint Port Labor Relations Committee setting forth the grievance and the facts as to the alleged discrimination. Such a grievance shall be timely if presented within ten (10) days of the occurrence of the alleged discrimination. Such grievance shall be investigated by the Joint Port Labor Relations Committee at a regular or special meeting of the Committee



at which the individual involved shall be permitted to appear to state his case, at which time he may present oral and written evidence and argument.

§17.411 provides: "With respect to any claim of violation of Section 13, the Joint Port Labor Relations Committee shall extend the time for filing of such claim beyond the time established in Section 17.41 whenever such extension is necessary because the period of limitation otherwise applicable is determined to be unlawful or because in the judgment of the Committee in the exercise of its sound discretion, such an extension is otherwise necessary to prevent inequity but in no event shall the time for filing of such claims be extended beyond six (6) months from the date of the occurrence of the alleged discrimination."

§17.42 provides: "Either the Employers, the Union or the man involved may appeal the decision of the Joint Port Labor Relations Committee. Such appeal shall be to the Joint Coast Labor Relations Committee by letter addressed to the Joint Coast Labor Relations Committee. To be timely, such appeal must be delivered or mailed within seven (7) days of the decision of the Joint Port Labor Relations Committee."

§17.421 provides: "If such an appeal is taken within the time limits allowed, the Joint Coast Labor Relations Committee shall either confirm or reverse or modify the decision of the Joint Port Labor Relations Committee without any

1. The first section of the report is devoted to a general description of the project and its objectives. It also includes a brief history of the project and a statement of the author's responsibilities.

2. The second section of the report is devoted to a detailed description of the project. It includes a description of the project's goals, objectives, and scope. It also includes a description of the project's methodology and a description of the project's results.

3. The third section of the report is devoted to a discussion of the project's results. It includes a discussion of the project's findings and a discussion of the project's conclusions. It also includes a discussion of the project's limitations and a discussion of the project's future work.

4. The fourth section of the report is devoted to a conclusion. It includes a summary of the project's findings and a statement of the author's conclusions. It also includes a statement of the author's recommendations and a statement of the author's acknowledgments.

further hearing, or order a further hearing and thereupon issue its decision on the basis of the entire record including that at both hearings."

§17.43 provides: "An appeal from the decision of the Joint Coast Labor Relations Committee can be presented to the Coast Arbitrator (or by agreement of the Joint Coast Labor Relations Committee to an Area Arbitrator) by the individual involved, the Employers or the Union. Appeal shall be by a written request for an arbitrator's hearing mailed or delivered to the Union and the Employer representatives of the Joint Coast Labor Relations Committee if by an individual, or to the individual and the other party's representative on the Joint Coast Labor Relations Committee if by either the Union or the Employers. Such an appeal shall be timely only if such request for an arbitrator's hearing is so filed in writing with the Joint Coast Labor Relations Committee no later than seven (7) days after issuance of the decision of the Joint Coast Labor Relations Committee from which an appeal to an arbitrator is taken.

§17.431 provides: "The arbitration procedure shall be carried on in accordance with the procedures generally applicable under this Agreement for arbitration before the Coast Arbitrator."

Sections 8.31, 8.43, 8.44, 9.1, 9.2, 13.1, and 18.1 of the PCCD are identical to the terms of the PCLCD except for the reference to "clerks" instead of "longshoremen".

JAN 14 1991

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

JOHN CARR, et al.,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, et al.,

Respondents.

GREG BROOKS, JUDY CHECKERS, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, et al.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM J. KILBERG
DENNIS A. GLADWELL
GIBSON, DUNN & CRUTCHER
800 Newport Center Drive
Suite 700
Newport Beach, CA 92660
(714) 759-3800
*Attorneys for Respondent
Pacific Maritime Association*

WILLIAM H. CARDER
RICHARD S. ZUCKERMAN
ROBERT REMAR
LEONARD, CARDER, NATHAN,
ZUCKERMAN, ROSS, CHIN &
REMAR
1188 Franklin Street,
Ste. 201
San Francisco, CA 94109
(415) 771-6400
*Attorneys for Respondents
ILWU and Locals 13 and 63*

QUESTION PRESENTED

The question presented is whether Petitioners' failure to exhaust the grievance procedures under a collective bargaining agreement, more accurately, their failure to file *timely* grievances, is excused because of (1) alleged bias of the grievance committees; (2) the alleged inadequacy of the arbitration procedures; (3) the alleged repudiation, by the grievance committees, of their own procedures; (4) the Union's alleged breach of its duty of fair representation; and (5) the alleged delay in handling grievances that were filed.¹

¹ These were the key issues addressed by the majority in the Ninth Circuit's Opinion.

LIST OF PARTIES

The Petitioners before this Court are listed in the Appendix to the Petition for Writ of Certiorari.

Respondents before this Court are the Pacific Maritime Association (PMA), the International Longshoremen's and Warehousemen's Union (ILWU) and two of its Locals, Local 13 and Local 63.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT	1
I. SUMMARY OF ARGUMENT.....	1
II. THE QUESTION PRESENTED BY PETITIONERS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT	4
A. The Ninth Circuit's Opinion Presents No Conflict With Any Decision of This Court or of Another Circuit	4
1. This case is consistent with this Court's prior decisions on exhaustion of remedies	4
2. There is no inter-circuit conflict over the exhaustion doctrine.....	7
B. The Question Presented Introduces No Issues Worthy of Review by this Court	8
1. Petitioners' allegations of bias do not merit the Court's review.....	8
2. Petitioners' allegations that the grievance and arbitration procedures in the collec- tive bargaining agreement are inade- quate do not merit review	11

TABLE OF CONTENTS – Continued

	Page
3. Petitioners' contention that they are excused from the exhaustion requirement because the Port LRC "repudiated" the grievance procedure does not merit review.....	13
4. Petitioners' contention that they are excused from exhausting contract remedies because of the Union's alleged breach of its duty of fair representation does not merit review	13
5. Petitioners' argument that they are excused from the exhaustion requirement because of delays in processing grievances is not worthy of review	15
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

<i>Alexander v. Pac. Maritime Ass'n.</i> , 434 F.2d 281 (9th Cir. 1970), cert. denied, 401 U.S. 1009(1971)	11
<i>Beriault v. Local 40, Super Cargoes & Checkers, ILWU</i> 501 F.2d 258 (9th Cir. 1974).....	11
<i>Carr v. Pac. Maritime Ass'n., et al.</i> , 904 F.2d 1313 (9th Cir. 1990).....	<i>passim</i>
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	2
<i>Cook Indus., Inc. v. C. Itoh & Co., (America) Inc.</i> , 449 F.2d 106 (2d Cir. 1971), cert. denied, 405 U.S. 921 (1972)	4, 7
<i>Early v. Eastern Transfer</i> , 699 F.2d 552 (1st Cir.), cert. denied, 464 U.S. 824 (1983)	4, 7, 9
<i>Gibson v. Local 40, Super Cargoes & Checkers, ILWU</i> , 543 F.2d 1259 (9th Cir. 1976).....	11
<i>Glover v. St. Louis - San Francisco Railway Co.</i> , 393 U.S. 324 (1969)	4, 5
<i>Griffin v. Pac. Maritime Ass'n.</i> , 478 F.2d 1118 (9th Cir.) (per curium), cert. denied, 414 U.S. 859 (1973)	11
<i>Hines v. Anchor Motor Freight, Inc.</i> , 424 U.S. 554 (1976)	4, 6
<i>Local 13, ILWU v. Pac. Maritime Ass'n.</i> , 441 F.2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972)	11
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	2
<i>McElroy v. United States</i> , 455 U.S. 642 (1982).....	1
<i>Republic Steel Corp. v. Maddox</i> , 379 U.S. 650 (1965) ..	4, 5, 6

TABLE OF AUTHORITIES – Continued

	Page
<i>Ritza v. ILWU</i> , 837 F.2d 365 (9th Cir. 1988) (per curiam)	11
<i>Scott v. Pac. Maritime Ass’n.</i> , 695 F.2d 1199 (9th Cir. 1983)	11
<i>Sheet Metal Wkrs. Intern. Ass’n v. Kinney Air Cond.</i> , 756 F.2d 742 (9th Cir. 1985)	9
<i>Texas v. Mead</i> , 465 U.S. 1041 (1984)	2
<i>United Paperworkers Int’l. Union AFL-CIO v. Misco, Inc.</i> , 484 U.S. 29 (1987)	12
<i>United States v. Doe</i> , 465 U.S. 605 (1984)	1
<i>United States v. Johnston</i> , 268 U.S. 220 (1925)	2
<i>United Steelworkers of Am. Local 1913 v. Union R.R. Co.</i> , 648 F.2d 905 (3d Cir. 1981)	4, 7
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967)	4, 6, 14
<i>Williams v. Pac. Maritime Ass’n.</i> , 617 F.2d 1321 (9th Cir. 1980), cert. denied, 449 U.S. 1101 (1981)	14

STATEMENT OF THE CASE

For its Statement of the Case, Respondents incorporate the opinion of the majority in this case. *Carr v. Pac. Maritime Ass'n., et al.*, 904 F.2d 1313, 1315-17 (9th Cir. 1990).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

Certiorari should be denied for three reasons. First, there is no *conflict* between the Ninth Circuit's opinion in *Carr* and any decision of this Court regarding exhaustion of contractual remedies. Sup. Ct. R. 17.1(c); see *United States v. Doe*, 465 U.S. 605, 610 (1984). In line with this Court's decisions in this area, the *Carr* opinion does not require, contrary to Petitioners' assertion, that a grievant completely exhaust the grievance procedure in order to preserve a federal action for breach of contract. The *Carr* majority requires only that a grievant notify the grievance panel of his allegations within the time limits set by the collective bargaining agreement.

Second, there is no conflict among the circuits addressing the issue of when a grievant is excused from exhausting his contractual remedies. Sup. Ct. R. 17.1(a); see *McElroy v. United States*, 455 U.S. 642, 643 (1982). The First, Second and Third Circuit cases Petitioner attempts to distinguish all hold that a grievant waives a claim of bias if he ~~fails~~ to raise his objection when the grievance

committee convenes. The Carr Opinion follows these decisions.

Third, certiorari would be inappropriate because the Petition seeks review of factual issues that were raised only by way of allegation, in the context of a summary judgment proceeding, which held in favor of these Respondents based on undisputed facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); see *Texas v. Mead*, 465 U.S. 1041 (1984). The arbitrator, district court and the Ninth Circuit essentially addressed only one issue: the untimeliness of Petitioners' grievances. The district court did deal briefly with Petitioners' lack of evidence of bias and nepotism, but only to observe that their "evidence" was allegation only and speculative. See, Petitioners' Appendix, District Court Findings No. 4, Conclusions of Law No. 7. Thus under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), Petitioners had no evidence sufficient to raise a material and triable issue of fact. The Petition seeks to bypass the issue of timeliness and present instead, the merits of their claims for *de novo* review by the Court, i.e. whether the PMA/ILWU joint grievance committees were biased, based on nepotism, as respects some or all of the 128 grievants who comprise the Petitioners here.

Petitioners' central contention, that the grievance procedures were inadequate, biased, or futile, is little more than a theoretical discussion about possible inadequacies of a contractual process Petitioners never used to test these allegations. As we know, there were two possible grievance routes: one based on discrimination claims

(Section 13), which ultimately is heard by a neutral arbitrator (Sam Kagel); and one based on all other grounds, which is heard and decided by joint committees of the PMA/ILWU, unless the committees disagree, in which case Kagel makes the final decision. Both grievance procedures required the grievant to file a claim within ten days of the event being grieved. Only forty one of the 128 *Carr* Petitioners filed individual timely grievances, and in only one case were any improprieties regarding the registration process or the bias or futility of the joint grievance committees alleged.²

The October, 1985 grievances that did raise nepotism and bias were untimely by five months and thus the grievance process, the Kagel arbitration, and the district court never got beyond the threshold issue of timeliness and exhaustion. Thus, not only are these issues not before this Court, Petitioners have never shown how the possible bias of the grievance committees related factually to their failure to file timely grievances, a necessary factual predicate to advance the arguments they assert here.

Finally, Petitioners' contention that delays in processing grievances excused them from exhaustion is not properly before this Court. This claim was never raised in the complaint, and the claim is based on what occurred after Petitioners resorted to federal court. For these reasons, Respondents respectfully request that the Petition be denied.

² The grievances essentially dealt with scoring and crediting issues. (CR 28, pp. 55).

II.

THE QUESTION PRESENTED BY PETITIONERS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

A. The Ninth Circuit's Opinion Presents No Conflict With Any Decision of This Court or of Another Circuit

Petitioners' contention that the Ninth Circuit's Opinion conflicts with decisions of this Court or of those from other circuits is erroneous. The *Carr* Opinion is fully consonant with this Court's decisions on exhaustion of contractual remedies, including *Glover v. St. Louis - San Francisco Railway Co.*, 393 U.S. 324, 331 (1969); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); and *Vaca v. Sipes*, 386 U.S. 171, 184-185 (1967). Far from presenting an inter-circuit conflict, the *Carr* opinion is in accord with the circuit court cases Petitioners attempt to distinguish, including *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *Cook Indus., Inc. v. C. Itoh & Co., (America) Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); and *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 913-14 (3d Cir. 1981).

1. This case is consistent with this Court's prior decisions on exhaustion of remedies.

Citing Judge Hall's dissent, Petitioners assert that the Ninth Circuit's Opinion "effectively overrules this Court's Opinion in *Glover*" (Petition p. 33) That is not true. In *Glover*, this Court created an exception to the exhaustion requirement by excusing a failure to fully

exhaust contractual remedies in situations where a formal effort to pursue such remedies would be completely futile. *Glover*, 393 U.S. at 327.

The plaintiffs in *Glover* had made numerous complaints concerning discrimination both to representatives of the union and the company, and had asked the union to process a grievance on their behalf under the collective bargaining agreement. *Id.* at 326. In response to these complaints, members of the union and the company allegedly ignored the complaints, made disparaging comments about the plaintiffs, and retaliated through intimidation and threats. *Id.* at 326-27. This Court held that plaintiffs' unsuccessful attempts to invoke contractual remedies established the futility of complying with the exhaustion requirement. *Id.* at 331. Moreover, this Court reaffirmed the basic rule that a grievant must in good faith *attempt* to exhaust contractual remedies: "Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioner's repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them." *Id.*

Nothing in *Glover* suggests that a grievant is excused from attempting to invoke contractual grievance procedures simply by claiming, *after the fact*, that his attempt would have been futile. Rather, *Glover* requires a litigant to show some good faith *attempt* to exhaust his remedy under the contract before he will be excused to proceed with a federal lawsuit.

The Ninth Circuit's holding in this respect is consistent with *Glover* since the majority does not, as the dissent

suggests, require a grievant to completely exhaust the grievance procedure. Petitioners could have preserved their bias claim by simply notifying the Port LRC "in a timely manner that they believed the grievance procedure was biased so that the Port LRC might have an opportunity to act on that complaint." *Carr*, 904 F.2d at 1318 n.7. Petitioners argue at length that it took time and effort to gather their evidence of bias. They miss the point. The Ninth Circuit suggests only that the issue of bias be timely raised, not that evidence be presented contemporaneously therewith. *Carr*, 904 F.2d at 1318.

Petitioners' contention that the *Carr* Opinion contradicts this Court's decision in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Vaca v. Sipes*, 386 U.S. 171 (1967) is also wrong. In *Maddox*, this Court prevented an employee from filing an action for breach of the collective bargaining agreement when he made no effort to resort to the grievance procedure. *Maddox*, 379 U.S. at 657. In *Hines*, this Court held that a failure to exhaust would be excused if a union breached the duty of fair representation in a way that "seriously undermine[d] the integrity of the arbitral process." *Hines*, 424 U.S. at 567. In *Vaca*, this court held that a wrongfully discharged employee could not obtain damages from the union since the union's failure to take his grievance to arbitration was not done in bad faith. Thus, none of these decisions run contrary to the holding in *Carr*. In fact, *Carr* merely applies these established principles to the case at hand. While Petitioners may believe the majority has misapplied these principles, this fact alone would not warrant review here.

2. There is no inter-circuit conflict over the exhaustion doctrine.

Petitioners claim that *Carr* conflicts with decisions in three other circuits. (Petition p. 34) On the contrary, these decisions, cited by Petitioners, each hold that a grievant must object to the bias of a grievance committee when the committee convenes or the objection is waived. *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir. 1983), *cert. denied*, 464 U.S. 824 (1983) ("[W]e will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies."); *Cook Indus., Inc. v. C. Itoh & Co., Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) ("Appellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first."); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 913-14 (3d Cir. 1981) ("When the reasons supporting an objection are known beforehand, a party may not wait to make an objection to the qualifications of a Board member until after an unfavorable award has been made.")

Like the plaintiffs in the cases cited above, Petitioners knew of the allegations of favoritism and bias well before the ten-day deadline. The arbitrator specifically found that "... the Grievants in this present arbitration could have filed grievances prior to May 15, 1985, in which they could have alleged discrimination." (CR 31, pp. 17-18). A notice specifically setting forth the ten-day appeal period was posted (CR 28, pp. 54-55), was seen by some plaintiffs, and widely discussed. (See Petitioners' Appendix,

District Court Findings, No. 8) And if a court were inclined to root around in the record there were innumerable admissions by Petitioners, in their depositions, that they believed prior to the May deadline, that they had been unfairly treated. (CR 30, Depositions of Carr, pp. 29-30; Balsley, pp. 23-24; Miller, p. 23; Regan, p. 23). The district court specifically found that "allegations of improprieties were common knowledge among members of the casual workforce" (of which the Petitioners were members). Petitioners' Appendix, District Court Findings, No. 4

The real question, with which Petitioners never come to grips, is why they missed the grievance deadline of May 15, 1985 in the first place. This is *the* reason both their section 13 claims and their non section 13 claims were not considered. Yet, the application each longshoreman filled out clearly stated:

"Any claim attacking the action of any labor relations committee . . . must be filed within ten (10) days of the action giving rise to the grievance. The ten (10) day limit on the filing of the grievance means that if it is not filed within the time, the issue can never be raised."

(CR 36, pp. 7-8, 53).

B. The Question Presented Introduces No Issues Worthy of Review by this Court

1. Petitioners' allegations of bias do not merit the Court's review.

It would little serve the interests of this Court to weigh, as a trial court, Petitioners' allegations of bias, a task never undertaken by an independent arbitrator, the

district court, or the Ninth Circuit. The untimeliness of the group grievances was the key issue addressed by those forums. Forty-one of the 128 instant Petitioners in these consolidated cases filed timely individual appeals when they were denied registration. Only one of them claimed bias. As discussed above, the Ninth Circuit correctly observed that these Petitioners waived their right to claim bias on the part of a grievance committee since they failed to raise the objection in their appeals. *Carr*, 904 F.2d at 1318. A fortiori, the remaining seventy-seven Petitioners in these cases stand in no better position, having failed to file a timely grievance.

In addition, Petitioners' contention that it would have been futile to file a timely grievance must clearly be wrong as a matter of law. Of the 318 individual appeals filed by unsuccessful applicants, thirty were subsequently registered. (CR 28, p. 55; CR 31, pp. 12-13). A process that grants ten percent of the appeals made is hardly futile.

Moreover, when parties to a collective bargaining agreement have agreed upon a particular method of dispute resolution, it is presumed fair. *Sheet Metal Wkrs. Intern. Ass'n v. Kinney Air Cond.*, 756 F.2d 742, 746 (9th Cir. 1985). Only upon a clear showing of "fraud or bad faith or demonstrated bias or collusion" will an arbitration or joint board decision be overturned. See *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.) cert. denied, 464 U.S. 824 (1983). No decision of this Court, or of any circuit, holds that a plaintiff may be excused from attempting to resort to contractual grievance procedures by claiming bias simply because of the possibility that a member of the grievance panel, that would hear their claim, might be biased against them.

In their statement of grievances, Petitioners did not identify any particular Local 13 or Local 63 representative who participated in the scoring or interviewing process as biased in favor or against any particular applicant. Nor did Petitioners come forward with evidence during the summary judgment phase, to show that any of those supposedly biased Local representatives in fact participated in denying their grievances. At most, Petitioners simply alleged that certain Union and PMA officials, including some members of the Joint Port LRC, had relatives who were registered while Petitioners did not, much of which was based on hearsay or speculation as the district court so found.

Even addressing the merits, it is by no means surprising that the registration of several hundred new Class "B" longshoremen and clerks would attract large numbers of applicants who are relatives, friends or neighbors of union members. These are individuals most likely to have knowledge of the excellent wages, benefits and working conditions enjoyed by those registered under the labor agreement. Additionally, Petitioners overlook the fact that a large number of applicants who were related to union members were denied registration.³

³ Additionally, Judge Hall's dissent in *Carr* states in conclusory fashion that "there have been at least as many complaints of bias against the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, as evidenced by the long list of lawsuits (including this one) filed against them on this ground." *Carr*, 904 F.2d at 1323 n.5 (Hall, J. dissenting). As evidence of this, Judge Hall simply cites various Ninth Circuit opinions concerning litigation involving

(Continued on following page)

2. Petitioners' allegations that the grievance and arbitration procedures in the collective bargaining agreement are inadequate do not merit review.

Again, Petitioners seek review of supposed theoretical weaknesses in a grievance procedure not utilized. Petitioners assert that they should be excused from the exhaustion requirement because the grievance and arbitration mechanisms are inadequate by not providing all

(Continued from previous page)

the Pacific Maritime Association. Few of these cases, however, involve the kind of bias belatedly raised by the Petitioners herein. Three of those cases involve allegations of racial discrimination. See *Griffin v. Pac. Maritime Ass'n.*, 478 F.2d 1118 (9th Cir.) (per curiam), cert. denied, 414 U.S. 859 (1973) (claims of racial discrimination dismissed as time-barred and for failure to exhaust administrative remedies); *Gibson v. Local 40, Super Cargoes & Checkers, ILWU*, 543 F.2d 1259 (9th Cir. 1976), (claim of racial discrimination dismissed on merits); *Scott v. Pac. Maritime Ass'n.*, 695 F.2d 1199 (9th Cir. 1983) (claim of racial discrimination). Another case involves discrimination against a union officer. *Local 13, ILWU v. Pac. Maritime Ass'n.*, 441 F.2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972). In other cases, the Ninth Circuit dismissed claims by union members or unsuccessful applicants for failure to exhaust contractual remedies. See *Alexander v. Pac. Maritime Ass'n.*, 434 F.2d 281 (9th Cir. 1970), cert. denied, 401 U.S. 1009 (1971); *Beriault v. Local 40, Super Cargoes & Checkers, ILWU*, 501 F.2d 258 (9th Cir. 1974) (claims of breach of collective bargaining agreement dismissed for failure to exhaust collective bargaining agreement remedies); *Ritza v. ILWU*, 837 F.2d 365 (9th Cir. 1988) (per curiam) (upholding dismissal based on failure to exhaust administrative remedies). These cases do not establish, as Judge Hall maintains, that the PMA grievance and arbitration procedures are *per se* biased. Moreover, given the fact that the PMA/ILWU contract covers all west coast longshoremen, six or seven cases, over the last twenty years, regarding the issues of exhaustion or discrimination, would be expected.

of the discovery devices, assistance of counsel, subpoena power, and additional time to investigate prior to the initial filing of their grievance. (Petition at 45-53) Essentially, Petitioners are complaining that the private grievance procedure does not mirror federal court procedure. Federal labor laws, however, "reflect a decided preference for private settlement of labor disputes without government intervention." *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). The fact that the contractual remedies in this case do not mirror federal procedure is presumably a choice made within the collective bargaining process. To the extent that an agreement does not violate the duty of fair representation, the parties to the contract may create remedies which they believe most fairly and economically preserve the rights of both parties. Importantly, the Ninth Circuit correctly observed that none of these "flaws" affected Petitioners' failure to timely invoke the contractual grievance procedure. Petitioners were only required to notify the Port LRC of the alleged bias. *Carr*, 904 F.2d at 1318.

In this case, any realistic appraisal of the grievance procedures afforded Petitioners affirms its appropriateness. Respondents processed more than 22,000 applications to fill approximately 387 positions during the 1984 registration. At some point in time, it was necessary to bring this expensive and time-consuming process to an end. To permit pretrial discovery, and the right to an attorney for every potential job applicant would be to eviscerate the purposes of industrial arbitration. The PMA/ILWU collective bargaining agreement is well within the mainstream of successful grievance procedures

which provide speedy, direct, common sense paths to dispute resolution.

3. **Petitioners' contention that they are excused from the exhaustion requirement because the Port LRC "repudiated" the grievance procedure does not merit review.**

Petitioners' contention that Respondents repudiated the grievance procedure because they "discouraged" appeals presents an issue of narrow interest inappropriate for review by this Court. That the Port LRC "did not wish to solicit large numbers of appeals" hardly amounts to a repudiation of the grievance procedure. Given the 22,000 applications for registration, the notice of the right to appeal contained in each application was a reasonable and sufficient measure.

The arbitrator's decision finds that forty-one of the 128 plaintiffs filed individual grievances, (CR 28, p. 55; CR 14A, pp. 2-41) all of which were heard. As to Petitioners' group grievances, not only did the PMA and ILWU process those grievances, but the section 13 (discrimination claims) were submitted to the neutral arbitrator for his decision. Had the arbitrator ruled that the grievances were timely, Petitioners' claims would have been heard on the merits. Thus, neither the PMA nor the ILWU repudiated the grievance procedure.

4. **Petitioners' contention that they are excused from exhausting contract remedies because of the Union's alleged breach of its duty of fair representation does not merit review.**

Petitioners misapply the doctrine that excuses a grievant from exhausting contractual grievance procedures based on a union's breach of the duty of fair

representation. There are two situations in which a breach of the duty of fair representation will operate to excuse the exhaustion requirement. First, where "the union has sole power under the contract to invoke the higher stages of the grievance procedure *and . . . the employee/plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance.*" *Vaca v. Sipes*, 386 U.S. 171, 185 (1967) (emphasis in original). Second, where grievants allege breach of the duty of fair representation with regard to negotiating the collective bargaining agreement. *Williams v. Pac. Maritime Ass'n.*, 617 F.2d 1321, 1328-30 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).

Neither exception excuses exhaustion in this case. Both with respect to section 13 and nonsection 13 grievances, unsuccessful applicants could invoke the grievance procedure without the assistance of the union. Second, Petitioners are not claiming that the union breached its duty of fair representation with regard to **negotiation** of the collective bargaining agreement. Petitioners only contend that certain union members unfairly reviewed their applications. As noted in *Carr*, "This allegation neither excuses plaintiffs' failure to file their grievances on time or to state their complaints with specificity, nor justifies their decision to sidestep the grievance process." *Carr*, 904 F.2d at 1320.

5. **Petitioners' argument that they are excused from the exhaustion requirement because of delays in processing grievances is not worthy of review.**

Petitioners' allegations concerning delay in the grievance procedure is not properly before this Court. As the Ninth Circuit observed, such allegations were not raised in the complaint. *Carr*, 904 F.2d at 1320. Indeed, no Petitioner has ever filed a complaint or attempted to amend a complaint based upon delay in the processing of their grievance. The majority in *Carr* correctly observed that Petitioners "base their assertion of unreasonable delay on what occurred after, rather than prior to, their resort to district court." *Carr*, 904 F.2d at 1320.

CONCLUSION

Missing from this case is any ground warranting the granting of certiorari. No conflict with any opinion of this Court exists. No inter-circuit conflict exists. Petitioners offer no reason why this Court should reexamine an area of the law that is well settled. They are seeking a review of the merits even though their claims, being time

barred, have never been addressed in any other forum.
As such, the Petition should be denied.

DATED: January 14, 1991

Respectfully submitted,

WILLIAM J. KILBERG
DENNIS A. GLADWELL
GIBSON, DUNN & CRUTCHER

By: William J. Kilberg

*Attorneys for Respondent
Pacific Maritime Association*

WILLIAM H. CARDER
RICHARD S. ZUCKERMAN
ROBERT REMAR
LEONARD, CARDER, NATHAN,
ZUCKERMAN, ROSS, CHIN &
REMAR

By: Richard S. Zuckerman

*Attorneys for Respondents
ILWU and Locals 13 and 63*
